112-139

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 242.

JOSEPH J. MERSMAN, APPELLANT,

vs.

CASPAR A. WERGES AND LUCY W. WERGES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED APRIL 28, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 242.

JOSEPH J. MERSMAN, APPELLANT,

vs.

CASPAR A. WERGES AND LUCY W. WERGES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	4	1
Deed Werges and wife to Kreuger	12	3
Subpœna	14	3
Marshal's return on subpœna	17	4
Appearance of defendants	20	5
Answer of Casper A. and Lucy W. Werges	22	5
Replication	35	8
Record entry, October 26, 1876, cause continued	39	9
Record entry, May 17, 1877, time for taking proofs extended	41	9
Stipulation extending time to take testimony	43	10
Record entry, August 31, 1877, examiners appointed	45	10
Motion for order extending time to take testimony and affidavit	47	10
Record entry, Jan'y 21, 1878, time for taking testimony extended	54	12
Stipulation as to publication of testimony	56	13
Motion to set cause for hearing	59	13
Record entry, November 11, 1878, leave granted to amend answer	61	14
Amended answer Casper A. and Lucy W. Werges	63	14
Record entry, May 31, 1879, leave granted to amend bill	68	15

	Original.	Print.
Amended bill of complaint	71	16
Answer of Casper A. Werges to amended bill	79	18
Answer of Lucy W. Werges to amended bill	85	19
Replication to answer Lucy W. Werges	93	21
Replication to answer Casper A. Werges	96	22
Exceptions of defendants and motion to suppress depositions	99	22
Motion to set cause for hearing	106	24
Record entry, October 17, 1879, order to produce promissory note	108	25
Record entry, November 12, 1879, defendants' exceptions overruled	111	25
Stipulation as to letters	114	26
Opinion	122	27
Complainant's evidence	139	32
Commission	140	32
Notice	143	33
Interrogatories	145	33
Notary's subpœnas	174	40
Deposition of Jos. J. Mersman	182	42
Chas. D. Orthwein	209	50
Wm. D. Orthwein	229	55
Exhibit A—Envelope	253	61
Respondent's evidence	255	61
Promissory note	256	61
Deposition of Caspar A. Werges	258	62
Lucy W. Werges	268	65
Evidence in case of Neilson *et al. vs.* Kreuger *et al.* used by stipulation	275	66
Stipulation of counsel	276	66
Deposition of Jos. J. Mersman	278	67
Chas. F. Orthwein	294	71
John P. Meyelis	299	73
Matthias Backer	302	74
Casper A. Werges	305	74
Lucy W. Werges	308	75
Jos. J. Mersman	312	76
Letters	314	77
Stipulation	345	85
Copy of mortgage—Werges and wife to Kreuger	347	85
Final decree and appeal	352	87
Appeal bond	355	87
Citation	359	88
Clerk's certificate	360	89

1, 2, 3 Pleas in the circuit court of the United States for the district of Iowa, begun and holden in the United States court-house, in the city of Des Moines, in said district, before the Honorable George W. McCrary and James M. Love, judges of said court, on the 10th day of May, A. D. 1880, and in the 104th year of the Independence of the United States.

E. R. MASON, *Clerk.*

4 Be it remembered that heretofore, to wit, on the 6th day of April, 1876, came Joseph J. Mersman, by his solicitors, Wright, Gatch and Wright and Thomas Updegraff, and filed in the clerk's office of the United States circuit court for the district of Iowa his bill of complaint in a certain cause wherein said Joseph J. Mersman is complainant, and Casper A. Werges and Lucy W. Werges are defendants, which said bill of complaint is in the words and figures following, to wit:

5 In the Circuit Court of the United States, in and for the District of Iowa.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES and LUCY W. WERGES.

To the judges of the circuit court of the United States, in [——] for the dist. of Iowa:

Joseph J. Mersman, a citizen of the State of Missouri, brings this his bill against Casper A. Werges and Lucy W. Werges, citizens of the State of Iowa, and thereupon your orator complains and says:

That on or about the 1st day of September, 1870, the said defendants, Casper A. Werges and Lucy W. Werges, made, executed, and delivered to one E. H. Krueger their certain promissory note in words and figures as follows:

$6,000.00. McGREGOR, *Sept.* 1, 1870.

6 One year from date, for value rec'd, I promised to pay E. H. Krueger, or order, six thousand dollars, with ten per cent. interest.

CASPER A. WERGES.
L. W. WERGES.

Upon which said note interest has been paid to Sept. 1st, 1874.

That complainant is the owner and holder of said note by endorsement in words and figures as follows:

"E. H. Kreuger to Joseph J. Mersman."

And your orator further respectfully shows and makes known unto your honors—

That to secure the payment of said note, the said respondent made, executed, and delivered to the said E. H. Kreuger their cer-

tain mortgage deed, whereby they conveyed to the said E. H. Kreuger the following described real estate, to wit:

7 The east half of the southwest quarter, the west half of the southeast quarter, and the southwest of the northeast quarter of section No. thirty (30), and the northwest quarter of the northwest quarter of section No. twenty-seven (27), all in township No. ninety-four (94) north, of range No. three (3) west 5th P. M., all of which will more fully and at large appear by reference to a copy of said mortgages hereto attached marked A, and made a part hereof, with the same purpose and effect as though incorporated in the body hereof.

And your orator further represents and makes known unto your honors that no part of said note has been paid, same as hereinbefore stated, and that the same, with interest thereon at the rate

8 of ten per cent. per annum from Sept. 1, 1874, is now due and unpaid, although payment thereof has been of said defendants frequently requested.

But now so it is, that the said defendants, contriving how to wrong and injure your orator in the premises, absolutely refuse to comply with said request.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, to the end therefore that the said Casper A. Werges and L. W. Werges may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their corporal oaths, and may, according to the best of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make

9 to such of the several interrogatories hereafter mentioned and set forth, as by the note hereunder written.

They are respectfully required to answer, that is to say—

1st. Whether, &c.

2d. Whether, &c.

And your orator prays that your honors will ascertain and determine the amount due on said note, and by the order, judgment, and decree of your said court, direct and require the said defendants, Casper A. Warges and L. W. Werges to pay said sum so ascertained and so adjudged by a day certain in said decree to be named and fixed, and that in default thereof said real estate, or so much thereof as may be necessary, may be ordered sold by a master of this court to satisfy said judgment and decree; that, in the event said property shall not sell for sufficient to satisfy said judgment and

10 decree then that complainant may have general execution, as by the laws of the State of Iowa provided; and that your orator may have such other, further, and different relief as to equity and the court shall seem meet or the circumstances of the case may require.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of the honorable court, directed to the said Casper

A. Werges, and L. W. Werges, commanding them on day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree, as may be made against them.

And your orator, as in duty bound, will ever pray, &c.

11 (Signed) WRIGHT, GATCH & WRIGHT,
(Signed) THOS. K. UPDEGRAFF,
Sol'rs for Compl't.

12 Know all men by these presents, that we, Casper A. Werges and Lucy W. Werges, his wife, of Clayton county, and State of Iowa, in consideration of the sum of six thousand dollars in hand paid by E. H. Kreuger, of Clayton county, and State of Iowa, do hereby sell and convey unto the said E. H. Kreuger, the following described premises, situated in the county of Clayton, and State of Iowa, to wit:

The east half of the southwest quarter, the west half of the southeast quarter, and the southwest quarter of the northeast quarter of section No. (30), and the northwest quarter of the northwest quarter of section twenty-seven (27), all in township No. ninety-four (94) north, of range No. (3) west 5th P. M.

And all warrant the title against all persons whomsoever.

To be void on condition that the said Casper A. Werges
13 shall pay to the said E. H. Krueger the sum of six thousand dollars, as follows:

One year from date, with ten per cent. interest thereon, according to the tenor and effect of his promissory note of even date herewith.

Signed the 1st day of Sept., 1870.

CASPER A. WERGES.
L. W. WERGES.

Duly stamped and acknowledged.

Endorsed: U. S. cir. court dist. of Iowa. Joseph J. Mersman *vs.* Casper A. Werges and Lucy W. Werges. Petition. 707. Wright, Gatch & Wright, and Thos. Updegraff, att'y for compl't. Filed Apr. 6, 1876. E. R. Mason, clerk.

14 And on the 6th day of April, 1876, a subpœna was issued out of the clerk's office of said court, directed to the said deants, which said subpœna is in the words and figures following, to fend wit:

15 UNITED STATES OF AMERICA, } *ss:*
District of Iowa, }

The President of the United States, to Casper A. Werges, Lucy W. Werges:

We command you and each of you, that you appear before the

judge of the circuit court of the United States, for the district of Iowa. at Des Moines, on the first Monday of May, it being the first day of May next, (A. D. 1876,) to answer to the bill of complaint of Joseph J. Mersman, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

16 To the marshal of the district of Iowa:

Returnable to the May rule day, it being Monday, the first day of May, A. D. 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., at Des Moines, this the 6th day of April, A. D. 1876, and of the Independence the 100th year.

[SEAL.] (Signed) E. R. MASON,
Clerk U. S. C. C. District of Iowa.

Memorandum.

The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Des Moines aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

[SEAL.] (Signed) E. R. MASON,
Clerk U. S. C. C. District of Iowa.

17 And on the 12th day of April, 1876, said subpœna was filed in the clerk's office, with the following return of the marshal thereon, which return is in the words and figures following, to wit:

18 This writ came into my hands for service on the 7th day of April, A. D. 1876.

And I served the same on the within named Lucy W. Werges and Casper A. Werges, on the 8th day of April, 1876, and by delivering a true copy of the same to each, at their place of residence, in the county of Clayton, and State of Iowa.

J. W. CHAPMAU,
U. S. Marshal.
EDWARD DOUGLASS,
Sp'l Deputy.

Marshal's Fee.

Mileage, 40 miles	$
Service on 2	4 00
Copy 2	2 00
	$6 00

Rec. payment full.

J. W. C.,
By R. AUKENY.

19 [Endorsed:] No. ——. Subpœna in chancery. Circuit court of the United States, district of Iowa. Joseph J. Mersman *vs.* Casper A. Werges and others. Returnable to rule day, first Monday in May, A. D. 1876. E. R. Mason, clerk. Filed April 12, 1876. E. R. Mason, clerk. Wright, Gatch & Wright, Thos. Updegraff, comp'ts sol.

20 And on the 18th day of April, 1876, an appearance was filed in said cause, which appearance is in the words and figures following, to wit:

21 In the Circuit Court U. S. for District of Iowa.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES, LUCY W. WERGES.

To E. R. MASON, Esq., clerk.

You will enter the appearance of the above-named defendants, Casper A. Werges and Lucy W. Werges, in the action above entitled, and forward to me by mail a copy of the complaint therein. Garnaville.

Apr. 14, 1876. Yours, &c.,
JAMES O. CROSBY,
Solicitor for said Def'ts.

[Endorsed:] 701. Filed Apr. 18, 1876. E. R. Mason, clerk.

22 And on the 3d day of July, 1876, the answer of Casper A. Werges and Lucy W. Werges was filed in said cause, which answer is in the words and figures following, to wit:

23 In the Circuit Court of the United States, District of Iowa.

JOSEPH J. MERSMAN, Complainant,
vs.
CASPER A. WERGES AND LUCY WERGES, Defendants.

To the Judges of the Circuit Court of the United States for the District of Iowa, in Equity.

The joint answer of Casper A. Werges and Lucy W. Werges, his wife, defendants above named, to the bill of complaint of Joseph J. Mersman, complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves all benefit and advantage of exceptions which may be had to the errors in said bill of complaint contained, for answer thereunto say, that they admit the execution and delivery of a note by the said Casper A. Werges of the same tenor and
24 effect as alleged in said bill of complaint, and the said Lucy W. Werges alleges that she did not sign said note, as she verily believes; that she was not requested, nor did she intend to

sign said note, and that no note was read to her to sign; and she is unable to read writing in the English language, and if her name was signed by her to said note it was done through ignorance and by mistake; that she was requested and intended only to sign her name to the mortgage, and therefore she alleges that said note is not her deed.

And these defendants, further answering, alleges that they have no knowledge sufficient to form a belief as to who is the owner and holder of said note, nor of the endorsement thereon, except as in said bill of complaint is stated, and have no information ac-
25 cepting that since the 19th day of January, 1875, they have heard that it was held by said complainant, he claiming to be its owner. And these defendants, further answering, admit the making of the mortgage as alleged in said bill of complainant.

And for further answer these defendants allege that, at the time of the execution of said note and mortgage, the defendant, Lucy W. Werges, was the wife of the said Casper A. Werges, and was the owner of the real estate in said mortgage described, and held the title thereof in her own name.

And these defendants, further answering, allege that prior to the execution of said note and mortgage, as defendants are now informed and believe, the complainant was a member of the firm of Orthwein & Mersman, a firm doing business in St. Louis, in the State of Missouri, and about the month of August, 1870, succeeded
26 to the business of Haenschen & Orthnein; and that said Orthnein and Mersman, and Joseph J. Mersman, and the said E. H. Kreuger, at St. Louis aforesaid, confederated together and conspired to obtain the execution of the said note and mortgage without any consideration to these defendants, and said note and mortgage were made payable to said E. H. Kreuger under the express direction to said E. H. Kreuger (as these defendants have lately ascertained) of the complainant.

Joseph J. Mersman, under the pretense expressed by him "to give the transaction an appearance of being a settlement of Mr. Werges and Mr. Kreuger," but for the purpose as these defendants now believe, of giving the said Mersman all of a *bona fide* purchaser as endorser for value, and to avoid the unlawful and usuri-
27 ous interest charged and taken by said Orthnein & Mersman, and to withdraw the same from their firm, that moneys received by them might not be charged as payment on the same.

And these defendants allege that they had no knowledge or information at the time said note and mortgage were executed; that said parties had, as aforesaid, conspired and confederated together to procure the execution of said instruments; that they were executed without any consideration whatever; that these defendants had full confidence in the integrity of said E. H. Kreuger, and he came to their home about six miles from the town of Clayton, shortly after his return from St. Louis, and represented that they were wanting some money to run the mill of Kreuger, Werges & Co., of

28 which the defendant Casper A. Werges was a member; that the mill was doing well, and if these defendants would execute the said mortgage to him, he could obtain the required sum, and the first shipments of flour would be applied in payment to discharge the mortgage, and when such shipments amounted to $6,000, that would be the end of the mortgage; that he would stand good himself for the full payment, and these defendants should have no trouble in respect thereto; and these defendants allege that they had up to that time no knowledge of the business of that mill, except what said Krueger had communicated to them; that relying implicitly upon the representation aforesaid, and by reason thereof, they executed said mortgage.

That when said note and mortgage became due, the said
29 E. H. Kreuger informed the defendant, Casper A. Werges, that they were fully paid up, and that the defendants so believed, and never received any information to the contrary until after the death of the said E. H. Kreuger, on the 19th day of January, 1875.

That about the 24th day of February thereafter the defendant, Caspar A. Werges, wrote to Orthwein & Mersman aforesaid, requesting that said note and mortgage be returned to him.

To which request he received answer from the complainant, Joseph J. Mersman, that he was the owner of said note and mortgage, and claiming the full amount thereof as in said bill of complaint.

And these defendants, further answering, say that they have been informed and believe, and therefore charge the same to be true, that from the date of said note and mortgage to the time of the
30 death of said E. H. Kreuger as aforesaid, all the flour manufactured and shipped from said mill was shipped for and on account of said firm of Orthwein & Mersman, and they received the entire net proceeds thereof, amounting, as these defendants believe, to over half a million dollars; and that in the accounts of said the Orthwein & Mersman unlawful interest was charged, and also the sum of two and one half per cent. was deducted from all moneys so received by them, for which said Kreuger, Werges & Co. received no credit on any account whatever, the said Orthwein & Mersman claiming to withdraw the sum for pretended commission, but these defendants have no knowledge of any service rendered therefor, and therefore charges that the same was only a cover for usury.

That during the years 1873 and 1874 said 2½ per cent. on
31 the net proceeds of such sales made by other parties and paid over to Orthwein & Mersman, and for which no credit was given or application of payment was made, amounted to the sum of $6,573.85, as defendants are informed and believe and therefore charge to be true.

And these defendants, further answering, allege that immediately after the death of E. H. Krueger as aforesaid the said Orthwein & Mersman took possession of the aforesaid mill of Krueger, Werges

& Co., at the town of Clayton, and run and held possession of the same until the stock of wheat on hand was manufactured, and shipped the same on their own account, the net proceeds of which, as these defendants believe, amounted to at least the sum of fifteen thousand dollars, for which the said Orthwein & Mersman have rendered no account whatever of its amount nor application.

32 All which matters and things these defendants are willing to aver and prove as this honorable court shall direct.

And these defendants ask that so much of said sums as may be necessary be applied to the payment of the note and mortgage in said complainant's bill of complaint mentioned, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) CASPER A. WERGES,
(Signed) WILLEMINE LUZIE WERGES.
(Translation, Wilhelmina Lucy Werges.)

33 STATE OF IOWA, } *ss:*
Clayton County, }

I, Casper A. Werges, and I, Lucy W. Werges, being duly sworn, depose and say that what is contained in this my answer, as far as concerns my own act and deed, is true of my own knowledge, and that what relates to the act and deed of any other person or persons I believe to be true.

(Signed) CASPER A. WERGES.
(Signed) LUCY W. WERGES.

Sworn to and subscribed before me, this 21st day of June, A. D. 1876.

[SEAL.] (Signed) D. MAURER,
Notary Public.

(Signed) L. A. HATCH & J. O. CROSBY,
Sol'rs for Def'ts.

(Signed) GALUSHA PARSONS,
Of Counsel.

34 [Endorsed:] U. S. circuit court. In equity. Joseph J. Mersman, 707, *vs.* Casper A. Werges and wife. Defendants' answer. L. O. Hatch & J. O. Crosby, def'ts solicitors. G. Parsons, of counsel. Filed July 3, 1876. E. R. Mason, clerk.

35 And on the 7th day of August, 1876, the replication of complainant to the answer of defendants was filed in said cause, which replication is in the words and figures following, to wit:

36 In the Circuit Court of the United States in and for the District of Iowa.

JOSEPH J. MERSMAN, Compl't,
vs.
CASPER A. WERGES and LUCY W. WERGES, Defendants.

The replication of complainants to the joint answer of Casper A. Werges and Lucy W. Werges.

These repliants, saving and reserving to themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold inconsistencies of the said answer, for replication thereunto say, that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that
37 the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants without this; that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein, and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Compl't.

38 [Endorsed:] U. S. circuit court. 707. Joseph J. Mersman *vs.* Casper A. Werges *et al.* Replication. Wright, Gatch & W., att'ys for pl'ff. Filed Aug. 7, 1876. E. R. Mason, clerk.

39 And on the 26th day of October, 1876, in the October term of said court, in the record of the proceedings thereof in said cause, there appears the following entry, to wit:

40 United States Circuit Court, District of Iowa. October Term, 1876.

THURSDAY, *October 26th*, 1876.

JOHN J. MERSMAN
vs.
CASPER A. WERGES *et al.* } No. 707. Eq.

This cause coming on for hearing was continued.

41 And on the 17th day of May, 1877, in the May term of said court, in the record of the proceedings thereof in said cause appears the following entry, to wit:

42 United States Circuit Court, District of Iowa. May Term 1877.

THURSDAY, *May* 17, 1877.

JOS. J. MERSMAN,
vs.
CASPER A. WERGES *et al.*, } No. 707. Eq.

This cause coming on for hearing, time for taking proofs for plaintiff was extended to 60 days from this date, and for defendant 30 days thereafter.

43 And on the 21st day of August, 1877, a stipulation was filed in said cause, which is in the words and figures following, to wit:

44 In the Circuit Court of the United States, District of Iowa.

JOSEPH MERSMAN
vs.
CASPER WERGES and LUCY W. WERGES.

It is hereby stipulated that time to both parties to take testimony herein be extended to Oct. 1st, 1877.

(Signed) GALUSHA PARSONS,
Re'p'ts Atty.

(Signed WRIGHT, GATCH & WRIGHT,
Sol'rs for Comp'l't.

[Endorsed:] U. S. Cir. C't. Joseph Mersman *vs.* Casper Werges *et al.* Filed Aug. 21, 1877. E. R. Mason, clerk.

Stipulation Extending Time to take Testimony.

45 And on the 31st day of August, 1877, it being in the May term of said court, in the record of the proceedings thereof in said cause is the following entry, to wit:

46 United States Circuit Court District of Iowa. May Term 1877.

FRIDAY, *August* 31, 1877.

JNO. J. MERSMAN
vs.
CASPER A. WERGES *et al.* } No. 707. Eq.

This cause coming on this day for hearing, and it was ordered that Robert Quigley, Esq., of McGregor, Iowa, and L. L. Wallbridge, of St. Louis, Mo., &c., and they are hereby appointed examiners to take testimony herein.

47 And on the 15th day of October, 1877, a motion and affidavit was filed in said cause, which are in the words and figures following, to wit:

48 In the Circuit Court of the United States in and for the District of Iowa.

JOSEPH J. MERSMAN
agt.
CASPER A. WERGES and others. } 707. Eq.

JOHN C. NULSON and others
agt.
WILLIAM KRUEGER and others. } 708. Eq.

Now come the respondents in each of the above-entitled causes, and now upon the record and the affidavit hereto annexed, for leave to take testimony on said causes, and that the time for so doing be extended for such time as the court shall think reasonable for such purpose.

(Signed) CROSBY & PARSONS,
Respon. Sol's.

[Endorsed:] 707–8. Eq. Mersman *vs.* Werges and Nulson *vs.* Krueger. Mo. Parsons.

49 STATE OF IOWA, } *ss:*
Clayton County,

James O. Crosby, being first duly sworn, says that he is one of the attorneys for the respondents, Casper A. Werges and William Krueger, in the case of John C. Nielson and others, complainants, against William Krueger and other, respondents, now pending in the circuit court of the United States for the district of Iowa.

That he was informed by G. Parsons, Esq., his associate counsel, at Des Moines, that the attorneys for the complainants had procured the appointment of commissioner, before whom to take testimony, one at St. Louis, Mo., and one at McGregor, Iowa.

That thereupon this affiant, by letter, requested the said Parsons to make arrangements with the attorneys for complainants at Des Moines, for the taking of testimony in behalf of respondents
50 at McGregor, at the time when complainants should take their testimony, to which request this affiant received from said Parsons' answer, that he had been to see C. H. Gatch, who was managing this case, and that he was absent in Chicago, and that no arrangement could be made until his return.

That afterwards, and on the 25th day of September, 1877, affiant applied to Mr. Thos. Updegraff, Esq., whom affiant supposed to be one of complainant[s'] attorneys in this case, and who resides at McGregor, Iowa, for the purpose of arranging to take the testimony of complainants and respondents, which was to be taken in Clayton county, Ia.

That thereupon said Updegraff informed affiant that he had nothing to do with the case, and that Gatch & Wright, of Des Moines, had written him that they should take no testimony in the

case, and that affiant would have to deal with said Gatch & Wright in the cases.

51 That afterwards affiant wrote to said Parsons, sending him the names of respondents' witnesses, and requesting him to serve a notice of the taking of their testimony on said Gatch & Wright.

That the first information that complainants did not intend to take any testimony was received by affiant from Mr. Updegraff on the 25th day of Sept., as aforesaid.

That up to the 25th of Sept. last affiant believed that said Updegraff was an attorney of record in the case, but affiant at that time was led to believe, by the statements of Mr. Updegraff aforesaid, that affiant was mistaken and that he was not an attorney in the case, and that service of notice on him would be useless.

That affiant is familiar with this case and knows the testimony in behalf of the respondents.

That from such knowledge affiant believes they have a
52 good defense upon the merits in a larger part to this action.

That there are four witnesses residing in Clayton county, Iowa, without whose testimony respondents cannot safely proceed to the trial of this action.

That the trial of this case involves the investigation of a larger number of accounts extending over a period of over seven years, and amounting to many thousands of dollars.

(Signed) JAMES O. CROSBY.

Subscribed in my presence by James O. Crosby, and sworn to by him before me, this 9th day of October, A. D. 1877.

Witness my hand and —— notarial seal, this day, year aforesaid.

[SEAL.] (Signed) WM. E. ODELL,
Notary Public.

53 [Endorsed:] 707–708. Eq. Mersman *vs.* Werges. Nulson *vs.* Krueger. Parsons. Motion for order, extending time to take testimony. Filed Oct. 15th, 1877. E. R. Mason, clerk.

54 And on the 21st day of January, 1878, it being in the October term, 1877, in the record of the proceedings thereof in said cause is the following entry, to wit:

55 United States Circuit Court, District of Iowa. Jan'y 21st, 1878.

JOHN C. NULSON *et al.*, Trustees,
vs.
WM. KRUEGER *et al.*
and
JOS. J. MERSMAN
vs.
CASPER A. WERGES *et al.*
} No.

On application of complainants for a commission to take testi-

mony on written interrogatories, it is ordered that said application be, and is hereby, denied.

On consent of parties, plaintiff and def't is ordered that complainant have thirty days from and after the 29th day of this present month in which to complete the taking of his testimony.

At Chambers, Keokuk, Iowa, Jan'y 21st, 1878.

(Signed) J. M. LOVE, *Judge.*

56 And on the 16th day of April, 1878, a stipulation was filed in said cause, which is in the words and figures following, to wit:

57 U. S. Circuit Court, 8th Circuit, District of Iowa.

JOSEPH MERSMAN
ag'st
CASPER WERGES *et al.*,

and

JOHN C. NULSON, Trustees, &c., *et al.*,
ag'st
WILLIAM KREUGER *et al.*

It is hereby stipulated that publication may be made by the clerk of all testimony filed in either of the above cases on the application of counsel for either of the parties.

(Signed) WRIGHT, GATCH & WRIGHT,
Sol's for Complainant.

(Signed) PARSONS & RUNNELLS,
Sol's for Def't.

58 [Endorsed:] No. 707 and 708. Mersman *et al. vs.* Werges *et al.* and Nulson *et al. vs.* Krueger *et al.* Stipulation. Filed April 16, 1878. E. R. Mason, clerk.

59 And on the 6th day of May, 1878, a motion was filed in said cause, which is in the words and figures following, to wit:

60 U. S. Circuit Court, 8th Circuit, Dist. of Iowa.

JOSEPH MERSMAN
vs.
CASPER H. WERGES and LUCY W. WERGES. } 707. Eq. May 6th. Rule.

Comes now the complainant and sets this cause down for hearing upon the record and such proofs as may properly be filed upon the hearing.

WRIGHT, GATCH & WRIGHT,
Solicitors for Complainant.

[Endorsed:] 707. Mersman *vs.* Werges. Filed May 6, 1878. E. R. Mason, clerk.

61 And on the 11th day of November, 1878, it being in the October term, 1878, in the record of the proceedings thereof in said cause is the following entry, to wit:

62 United States Circuit Court, District of Iowa. October Term, 1878.

MONDAY, *Nov.* 11, 1878.

JOHN J. MERSMAN
vs.
CASPER A. WERGES *et al.* } No. 707. Eq.

This cause coming on this day for hearing, and the defendants were given leave to amend their answer.

63 And on the 11th day of November, 1878, the amended answer of Casper and Lucy W. Werges was filed in said cause, which is in the words and figures following, to wit:

64 In the Circuit Court of the United States, District of Iowa.

JOSEPH J. MERSMAN, Complainant,
vs.
CASPER A. WERGES and LUCY WERGES, Defendants.

To the Judges of the Circuit Court of the United States for the District of Iowa. In Equity.

The supplement[al] joint answer of Casper A. Werges and Lucy W. Werges, his wife, defendants above named to the bill of complaint of Joseph J. Mersman, complainant.

These defendants, by leave of the court first obtained, for supplemental answer to said bill of complaint, allege that when the note mentioned in said bill was delivered to E. H. Krueger, the payee thereof, it was signed only with the signature of the said Casper A. Werges, since which time neither of these defendants have ever seen said note; that the signatures of L. W. Werges to
65 said note was not made by her, nor by her directions, nor with her knowledge or consent, nor has she ever assented to it as her act.

And these defendants therefore allege that said note is not their deed.

And these defendants further allege that since the making and filing of their answer herein they have received information that leads them to believe, and they do believe, and therefore charge the same to be true, that after the note of Casper A. Werges was de- Clayton, on the next day after its date, the name of said L. W. livered by him to the payee thereof the said E. H. Kruger, at Werges was falsely and fraudulently forged to said note by the said E. H. Krueger, without the knowledge or consent of either of these defendants, and the note so fraudulently altered is the
66 note [set] forth in the said bill of complaint.

And these defendants, further answering, allege that when they executed the mortgage in said bill of complaint set forth, it was not for the purpose of securing the note in said bill mentioned and set forth, but another and different note, viz., the sole individ ual note of Casper A. Werges, which was, subsequent to its delivery to the payee thereof, fraudulently altered as aforefaid.

STATE OF IOWA, } *ss:*
Clayton County, }

I, Casper A. Werges, and I, Lucy W. Werges, being duly sworn depose and say, that what is contained in this my answer, as far as concerns my own act and deed, is true of my own knowledge, and that what relates to the act and deed of any other person or persons, I believe to be true.

67 (Signed) CASPER A. WERGES.
(Signed) LU. W. WERGES.

Sworn to and subscribed before me, this 16th day of September, 1878.

[SEAL.] (Signed) JAMES O. CROSBY,
Notary Public.

J. O. HATCH & JAMES O. CROSBY,
Sol's for Resp'd'ts.

GALUSHA PARSONS.

[Endorsed:] U. S. circuit court. Joseph J. Mersman *vs.* Casper A. Werges and wife. 707. Eq. Respondent's supplemental answer. L. O. Hatch & J. O. Crosby, resp'd'ts sol's. G. Parsons, of counsel. Filed by leave of court, November 11, '78. E. R. Mason, clerk.

68 And on the 31st day of May, 1879, it being in the May term of said court, in the record of the proceedings thereof in said cause is the following entry, to wit:

69 United States Circuit Court, District of Iowa, May Term, 1879.

SATURDAY, *May* 31, 1879.

JOHN J. MERSMAN } No. 707. Eq.
vs.
CASPER A. WERGES *et al.* }

This cause coming on this day for hearing, and was submitted to the court on the bill, answer, replication, and the proofs filed.

Complainant appeared by Wright, Gatch & Wright, and the defendants by Parsons & Runnells, and the court being advised, it was ordered that the complainant have leave to file an amendment to his bill of complaint.

By consent of parties the same answer and replication to apply to

the complainant bill as amended; or if the defendants elect, they have leave hereby to file a new answer in ten days.

70 The complainant to file replication to the said new answer *instanter*, and the time for taking further proofs is hereby extended sixty days after replication is filed.

71 And on the 9th day of June, 1879, an amended bill of complaint was filed in said cause, which is in the words and figures following, to wit:

72 In the Circuit Court of the United States for the District of Iowa.

JOSEPH J. MERSMAN, Compl't,
vs.
CASPER A. WERGES and LUCY W. WERGES, Def'ts.
} Amended Bill of Complaint.

To the Judge of the Circuit Court of the United States for the District of Iowa.

Joseph J. Mersman, of the city of St. Louis, and State of Missouri, and a citizen of the State of Missouri, having heretofore brought his bill of complaint herein against Casper A. Werges and Lucy W. Werges, of the county of Clayton, State of Iowa, and citizens respectively of the State of Iowa, and the said Casper A. Werges and Lucy W. Werges having appeared and answered thereto, now, by leave of the court first had, files this, his

73 amended bill of complaint against said Casper A. Werges and Lucy W. Werges, and humbly complaining, your orator showeth that said Casper A. Werges, on the first day of September, 1870, applied to your orator to lend him the sum of $6,000.00, on the security of the premises hereinafter described, and to evidence the proposed loan made delivered to one E. H. Kreuger, acting in that behalf as the agent of said Casper A. Werges, his promissory note, in the words and figures following:

$6,000.00. McGREGOR, *September* 1, 1870.

One year from date, for value received, I promise to pay to E. H. Kreuger, or order, six thousand dollars, with ten per cent. interest.

CASPER A. WERGES.

And then, together with the said Lucy W. Werges, in order to secure the repayment of the said proposed loan, executed and delivered to the said Kreuger, as agent aforesaid of said

74 Casper A. Werges, mortgage in fee simple of and upon the following real estate situated in the county of Clayton, and State of Iowa, to wit:

The east half of the southwest quarter, the west half of the southeast quarter, and the southwest quarter of the northwest quarter of section number 30, and the northwest quarter of the northwest

quarter of section number 27, all in township number 94 north, of range number 3 west of the fifth P. M., Iowa.

That said promissory note and mortgage were so made and delivered to said Kreuger as agent as aforesaid of the said Casper A. Werges, and for the accommodation of said Casper A. Werges, and that after such delivery thereof, and before the same were delivered, as hereinafter mentioned, to complainant, what purports to be the signature of the defendant, Lucy W. Werges, as one of the
75 makers of said note, was by some person to complainant unknown subscribed thereto under the name of Casper A. Werges.

That said Kreuger still having said mortgage in his possession on the 2d day of September, 1870, filed the same for record with the records of deeds and mortgages of said court of Clayton, and caused the same to be recorded in book 12, page 175, of the records of mortgages of said county.

That after said mortgage had been so recorded the said Kreuger delivered the same, together with said note, to the firm of Kreuger, Werges & Co., a firm then doing business in that name at the town of Clayton, in said Clayton county, of which the said Kreuger and the said Casper A. Werges respectively were members; that the proceeds of said proposed loan were intended for the use and benefit of said firm in carrying on their firm business; and that
76 said note and mortgage were transmitted by said firm by mail from Clayton, Iowa, to complainant at the city of St. Louis, Missouri, and on the receipt thereof by complainant at said city he advanced and paid upon the security thereof to said Casper A. Werges, for the use of said firm of Kreuger, Werges & Co., said sum of $6,000.00 intended as aforesaid, to be evidenced and secured thereby; that complainant is the holder and owner of said note and mortgage; that no payment has been made thereon except of interest, which has been paid to September 1st, 1874, and that there is now due from said Casper A. Werges to complainant on said note and mortgage said principal sum of $6,000.00, with ten per cent. interest thereon from the day and year last aforesaid, which the said Casper A. Werges neglects and refuses to pay, although payment has been frequently requested of him.

77 Your orator therefore prays that defendants be required to answer this amended bill of complaint within the time after filing thereof, fixed by the court in its order heretofore made, but not under oath.

That an account may be taken under the direction of the honorable court of what is due upon said note and mortgage; that the defendant Casper A. Werges may be decreed to pay unto your orator what shall thus appear to be due, with the costs of this suit, by a short day to be named in this decree, and in default thereof, that said real estate, or so much thereof as may be necessary for that purpose, may be ordered sold to satisfy the amount so found to be due, and that on such sale being made the defendants, Casper A.

Werges and Lucy W. Werges, and all persons claiming under them, may be absolutely barred and foreclosed of any equity of re-
78 demption which they, or any of them, may or might otherwise have therein, and that your orator may have such other and different relief as in equity may to the court seem meet.

And your orator as in duty bound will ever pray.

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Complainant

C. H. GATCH,
Of Counsel.

Endorsed: U. S. circuit court. Joseph J. Mersman *vs.* Casper A. Werges *et al.* Amended bill of complaint. Filed June 9, 1879. E. R. Mason, clerk. Wright, Gatch & Wright, for complt.

79 And on the 7th day of July, 1879, the answer of Casper A. Werges to the amended bill was filed in said cause, which is in the words and figures following, to wit:

80 In the Circuit Court of the United States, in and for the District of Iowa.

JOSEPH MERSMAN *agst.* CASPER A. WERGES and LUCY W. WERGES.

The separate answer of Casper A. Werges to the amended bill of said complaint reaffirming all of the allegations of the answer herein to said original bill. The said defendant further says:

1. He denies that he at any [time] borrowed any sum whatever of the said complainant.

2. He denies that he delivered the said alleged promissory note to the said Krueger as his agent.

3. He denies that he executed and delivered the said alleged
81 mortgage to the said Krueger as his agent, and each and every allegation in the said amended bill touching the said alleged agency.

4. He denies that the said note and mortgage were given for his accommodation.

5. He denies that the said note and mortgage were at any time delivered to the firm of Krueger, Werges and Company.

6. He denies that the said note and mortgage were at any time transmitted by the said firm to the complainant.

7. He denies that the said complainant at any time, advanced any sum whatever to him upon the security of the said note and mortgage, or otherwise.

8. He denies that the complainant is the owner or holder of the said note and mortgage, or either of them.

82 Further answering, the said respondent says:

That on or about the day of the date of the said alleged promissory note, the said Krueger, as the agent of the said complainant, and not otherwise, applied to this respondent to execute

and deliver to him, the said Krueger, as such agent, the said promissory note and mortgage, and then and there represented to him that the said firm of Krueger and Werges were largely indebted to the said complainant, and that unless said indebtedness was immediately secured, the business of said firm would be irretrievably ruined.

That by reason of said representation, and the further representation set forth and alleged in his original answer, he executed said note and mortgage without any consideration whatever therefor.

That his wife, the said Lucy A., in like manner, and without any consideration therefor, but as the surety for said Krueger, executed and deliver[ed] the said mortgage to the said Krueger, but with the distinct agreement upon the part of the said Krueger, that he would provide for the payment thereof, and that she should at no time be called upon for the payment thereof; and that the same should in no way be made chargable upon her said property, except as the surety of said firm.

That the said note was afterwards fraudulently altered by the said Krueger, by adding thereto, without any authority for so doing, the name of the said Lucy A. Werges as one of the makers thereof.

That the said complainant had full knowledge of such fraudulent alteration thereof at the time that he received the same.

(Signed) J. O. CROSBY,
AND PARSONS & RUNNELLS,
Sol's for Resp't.

(Signed) CASPER A. WERGES.

Endorsed: Mersman *vs.* Werges *et al.* Answer to am'd bill of Casper A. Werges. Filed Jul. 7, 1879. E. R. Mason, clerk.

And on the 7th day of July, 1879, the answer of Lucy W. Werges to the amended bill of complaint, was filed in said cause, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Iowa.

JOSEPH J. MURSMAN,
vs.
CASPER A. WERGES and LUCY W. WERGES.

The said Lucy W. Werges for her separate answer herein to the said amended bill, and by way of supplement to her original answer to said original bill, and without any way waiving the same, saving all exceptions to said amended bill, says:

1. She denies that the said Casper A. Werges applied to the said complainant for a loan of money as alleged in said amended bill, or in any other way.

2. She denies that said promissory note was delivered to said

Krueger for said complainant to secure a loan by said com-
87 plainant to said Casper A. Werges, or in any other way, or for any other purpose than as hereinafter alleged.

3. She denies that she or the said Casper A. executed said mortgage in any other way, or for any other than as hereinafter stated.

4. She denies that the said Krueger was at any time the agent of the said Casper A. for any purpose whatever connected with the said note and mortgage, or for the purpose of borrowing money of the said complainant.

5. She denies that the said note or mortgage was at any time delivered to the said Krueger as the agent of the said Casper A., or for any other purpose than as hereinafter stated.

88 8. She denies any knowledge of the allegation in said amended bill as to the recording of said mortgage.

9. She denies that the said note or mortgage was at any time delivered to the firm of Krueger, Werges and Company.

10. She denies that the proceeds of said note and mortgage was intended for the use of said firm in carrying on their business.

She denies that the complainant paid to the said Casper A. Werges the sum of six thousand dollars, or any other sum upon the security of said note and mortgage for the use of said firm or otherwise.

11. She denies that there is any sum whatever due complainant upon said note and mortgage.

89 And further answering, the said defendant says:

That prior to the date of said note and mortgage the said E. H. Krueger applied to the said complainant for a loan of money, but whether for his own use or for the use of the said firm of Krueger and Werges this respondent has no knowledge or belief.

That the complainant then promised and agreed to loan to the said Krueger the sum of six thousand dollars, and then and there authorized him, the said Krueger, as the agent of the said complainant, and not otherwise, to obtain security for said sum from the said Casper A. Werges to secure the sum so *so* agreed to be loaned by said complainant to said Krueger. This respondent further says that the said Krueger, so acting as the agent of the said
90 complainant, and not otherwise, by false and fraudulent representations as to the purpose for which said note was designed, procured, and induced the said Casper A. to execute and deliver the same to him, the said Krueger, and thereupon the said Krueger falsely and fraudulently represented to this respondent that the said note would remain in the control of him, the said Krueger, until the earnings of a certain mill then being operated by him should be sufficient to pay the same, and that the same should be paid out of such earnings, although the said Krueger then designed to dispose of said note and to defraud this respondent, and that by means of said false and fraudulent representation the said Kreuger then and there induced this respondent to sign and de

liver said mortgage without any consideration therefor, and
91 solely as the surety of the said Casper A. and the said Krueger, and not otherwise.

That at the time of the execution thereof she was the sole owner in fee simple of said real estate which [was] well known both to the said Kreuger and the said complainant, and the title thereto appeared upon the proper records of said county.

That after the said note and mortgage were delivered to the said Kreuger as the agent of the said complainant, he, the said Kreuger, fraudulently, and without any authority so to do, signed the name of this respondent to said note, but whether before or after the same was actually delivered to complainant this respondent has no knowledge or information, and thereafter the said Kreuger fraudulently, and without any authority so to do, transferred and delivered
92 said note to his principal, the *the* said complainant, but without any other or further consideration thereafter than a loan of money theretofore made by the said complainant to him the said Kreuger.

And the said respondent further says the said Krueger and Werges from him sold and delivered to the said complainant, flour, meal, and other merchandise, in payment of the said note and mortgage, and that the same was fully paid prior to the commencement of this suit.

(Signed) J. O. CROSBY
AND PARSONS AND RUNNELLS.
Sol's for Lucy A. Werges.

[Endorsed:] Mersman *vs.* Werges. Ans. of Lucy W. Werges to amended bill. Filed Jul. 7, 1879. E. R. Mason, clerk.

93 And on the 7th day of July, 1879, the replication of complainant to the answer of Lucy W. Werges was filed in said cause, which is in the words and figures following, to wit:

94 In the Circuit Court of the United States, for the District of Iowa.

JOSEPH J. MERSMAN, Complainant,
vs.
CASPER A. WERGES, LUCY W. WERGES, Defendants.

The replication of Joseph J. Mersman, complainant to the answer of Lucy W. Werges, to complainant's amended bill of complaint herein. This repliant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, sayeth.

That he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, insufficient to be replied unto by this repliant, without this—

95 That any other matter or thing whatsoever in the said answer containing material or effectual in the law to be replied unto, confessed, and avoided, traversed, or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) WRIGHT, GATCH & WRIGHT,
Sols. for Complainant.

[Endorsed:] U. S. Circuit Court. Joseph J. Mersman *vs.* Casper Werges *et al.* Replication to ans. of Lucy W. Werges to am. bill. Wright & Gatch. Filed Jul. 7, 1879. E. R. Mason, clerk.

96 And on the 8th day of July, 1879, the replication of the complainant to the answer of Casper A. Werges was filed in said cause, which is in the words and figures following, to wit:

97 In the Circuit Court of the United States for the District of Iowa.

JOSEPH J. MERSMAN, Complainnat,
vs.
CASPER A. WERGES and LUCY W. WERGES, Defendants.

The replication of Joseph J. Mersman, complainant, to the answer of Casper A. Werges, to complainant's amended bill of complaint herein:

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiences of the said answer, for replication thereunto, sayeth that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, insufficient to be replied unto by this
98 repliant, without this—

That any other matter or thing whatsoever in the said answer contained, material, or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) WRIGHT, GATCH & WRIGHT,
Sol'rs for Complainant.

[Endorsed:] U. S. circuit court. Joseph J. Mersman *vs.* Casper A. Werges *et al.* Replication to ans. of Casper A. Werges to am. bill. Wright & Gatch. Filed Jul. 8, 1879. E. R. Mason, clerk.

99 And on the 30th day of September, 1879, the respondents filed exceptions and motion to suppress depositions in said cause, which are in the words and figures following, to wit:

100 In the Circuit Court of the United States, District of Iowa.

J. J. MERSMAN *vs.* CASPER A. WERGES and LUCY W. WERGES.

The respondents, Casper A. Werges and Lucy W. Werges, except to the following portions of the depositions of J. J. Mersman, filed herein on the 27th day of September, 1879, upon the ground of immateriality and incompetency:

1. To the answer to direct interrogatory 4.
2. To the answer to interrogatory No. 5.
3. To the answer to interrogatory No. 6.

4. To the answer to interrogatory No. 7 upon the same
101 grounds as above, and the further grounds that it [is] not responsive to the questions.

5. To the answer to interrogatory No. 9, upon the grounds last above.

6. To the answer to cross-interrogatory No. 6, upon the ground that the same is insufficient and that the letters should be produced.

7. To the answer to cross-interrogatory 7, upon the grounds last above.

8. To the answer to cross-interrogatory No. 9, upon the same ground as last above, and the further ground that the same is not responsive to the question.

9. To the answer to cross-interrogatory No. 12, upon the ground that the same is irresponsive and evasive.

102 10. To the answer to cross-interrogatory 14, upon the grounds last above.

11. To so much of the answer to cross-interrogatory No. 15 as is irresponsive to the question.

12. To the answer to cross-interrogatory 16, upon the ground that the same is irresponsive, insufficient, and evasive.

13. To the answer of Charles F. Orthwein to direct interrogatory No. 5, upon the ground that the same is immaterial and incompetent and irresponsive to the question.

14. To the answer to interrogatory No. 8, upon the same grounds as last above.

15. To the answer of Wm. D. Orthwein, as follows: To answer to direct interrogatory No. 5 as incompetent and immaterial.

103 16. To answer to direct interrogatory No. 8, upon the same grounds and the further ground that it is irresponsive to the question.

17. To answer to cross-interrogatory No. 7, as insufficient and evasive.

18. To answer to cross-interrogatory No. 12, as insufficient and evasive.

19. To answer to cross-interrogatory No. 15, as insufficient and evasive, and that copies of the books should be attached.

20. To answer to cross-interrogatory 16, upon the same grounds as last above.

(Signed) PARSONS & RUNNELS,
Solrs. for Respdts., C. A. Werges & L. W. Werges.

104 In the Circuit Court of the United States, District of Iowa.

J. J. MERSMAN *vs.* CASPER A. WERGES and LUCY W. WERGES.

The respondents, Casper A. Werges and Lucy W. Werges, move to suppress the deposition of J. J. Mersman, filed herein upon the 29th day of September, 1879, upon the grounds that the answers to the cross-interrogatories are insufficient, imperfect, and evasive, and that the letters and *books called* for by said interrogatories are not produced or attached to said deposition, which motion will be made upon the first day of the next term of this court.

Dated: Sept. 29, 1879.

(Signed) PARSONS & RUNNELLS,
WITH J. O. CROSBY,
Sol'rs for above-named Respd'ts.

105 [Endorsed:] U. S. C. C. Mersman *vs.* Werges et al. Exceptions and motion to suppress deposition. Parsons & Runnells, and J. O. Crosby, for respd'ts. Filed Sept. 30, 1879. E. R. Mason, clerk.

106 And on the 6th day of October, 1879, a motion was filed in said cause, which is in the words and figures following, to wit:

107 In the Circuit Court of the United States, in and for the District of Iowa.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES. } 707. Equity.

To the Clerk of the said court:

Set above case down for hearing on the pleadings, the evidence on file.

Other evidence to be used as per stipulations on file, the note and mortgage in suit, and such documentary evidence as may properly be offered on the hearing.

(Signed) WRIGHT, GATCH & WRIGHT,
Sol'rs for Comp'lt.

[Endorsed:] U. S. circuit court. J. J. Mersman *vs.* Casper A. Werges et al. Præcipe to set down. Wright, Gatch & Wright. Filed Oct. 6, 1879. E. R. Mason, clerk.

108 And on the 17th day of October, 1879, it being in the October term, in the record of the proceedings thereof in said cause, is the following entry, to wit:

109 United States Circuit Court, District of Iowa. October Term, 1879.

FRIDAY, *October* 17, 1879.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES and LUCY W. WERGES. } 707. Eq.

On reading and filing the petition of the above-named respondents, Casper A. Werges and Lucy W. Werges, Galusha Parsons appearing for said petitioner, and C. H. Gatch opposed.

Ordered, That the promissory note described in the bill of complaint be produced at the city of McGregor upon the day and before the notary public before whom the said respondents are to be examined as witnesses, and that at the time of and before the commencement of said examination, each of said respondents,
110 and their counsel then present, be permitted to examine the same in the presence of the examiners.

(S'g'd) J. M. LOVE, *Judge.*

111 And on the 12th day of November, 1879, it being in the October term in the record of the proceedings thereof in said cause is the following entry, to wit:

112 United States Circuit Court, District of Iowa. October Term, 1879.

WEDNESDAY, *November* 12, 1879.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES *et al.* } No. 707. Eq.

This cause coming on this day for hearing on the defendants' exceptions to portions of the depositions of J. J. Mersman, Chas. F. Orthwein, and Wm. D. Orthwein, filed herein on the 27th day of September, 1879.

The defendants appeared by Parsons & Runnells, and the complainant by Wright, Gatch & Wright, and the court after argument of counsel thereon being now fully advised:

Ordered, That the said exceptions, and each of them, except
113 the exceptions to answer to cross-interrogatory No. 12 to Wm. D. Orthwein, be, and the same are hereby, overruled without prejudice to the right of defendants to object to the reading of the same on the trial on the grounds of immateriality or incompetency, and that the exception to the answer to cross-interrogatory No. 12, Wm. D. Orthwein, be, and the same is hereby, sustained as not responsive.

114 And on the 23d day of June, 1880, a stipulation was filed in said cause, which is in the words and figures following, to wit:

115 United States Circuit Court, 8th Circuit, Dist. of Iowa.

JOSEPH J. MERSMAN
vs.
CASPER WERGES and LUCY WERGES. } Stipulation.

It is hereby stipulated that the two letters hereto attached, marked "A and B," respectively, are in the handwriting of E. H. Krueger, and that they may be filed as part of the evidence of complainant in the above entitled cause.

That the same are what they purport to be and were forwarded by due course of mails to and received by complainant at St. Louis, but this stipulation is subject to the admission of complainant hereby made that the defendant, Lucy Werges, and her husband knows nothing of the contents of said letters, or of the fact of them
116 having been written. This stipulation is designed as a waiver of proof as to the writing and receipt of said letters, and not as an admission of their competency, if duly proved.

(Signed) WRIGHT, GATCH & WRIGHT,
Sol's for Complainant.

(Signed) GALUSHA PARSONS,
Sol'r for Resp't.

117 KRUEGER, WERGES & Co.,
Proprietors of Clayton Brick Mills, and General Produce Dealers.
CLAYTON, IOWA, *Sept.* 5, 1870.

MERSER, ORTHWEIN & MERSMAN, *St. Louis.*

GENTLEMEN: Your favor of the 31st ultum came to hand. Contents fully noted; also have rec'd enclosed check on J. Jack for two thousand ($2,000) [dollars,] which is placed to your credit. In regard, a trust deed on Werges' farm, E. H. Krueger has consulted some of the best lawyers in McGregor. They say that a deed of trust has run out in this State, and that a trust deed can have only the effect of a mortgage.

As a trust deed cannot be so made to allow the trustee to sell the court without a decree of cart. I enclose few lines written by the lawyer to send to you.

Mr. Werges and Mrs. Werges have therefore executed a
118 mortgage in place of a trust deed on the first day of Sept., 1870, for $6,000, and note to the same effect to accompany mortgage, which I have sent to our county court, Elkader, on the 2d inst. for records.

Mr. Werges' farm is unincumbered; but if you wish to have an abstract of title, will get it and send it to you with his deed. Sorry

that your letter came in too late, as the mortgage was executed and sent already for recorder to make it $8,000 in place of $6,000.

Wheat is selling here from 75 to 80c. per bu. for choice No. 1, weighing from 60 to 63 lbs. to the measured buss.

But it is not arriving very freely. Us farmers are holding back for higher prices. Barley, we have not bought any as yet [Jo.] is in the market buying all the barley he can git, paying from
75 to 80c., and shipping it to Chicago. Is it safe to pay those
119 prices to ship to St. Louis. Our quality of barley here is fair; it is not quite as white as the sample Mr. Klainsmith had on hand when I were in St. Louis; it looks some darker, but it is sound otherwise, waying from from 46 to 48 per bu. Will start the mill to-morrow, and send the mortgage as soon as recorded.

Yours, very truly,
(Signed) KRUEGER, WERGES & CO.
By E. H. KREUGER.

18 per cent. KRUEGER, WERGES & CO.

CLAYTON CITY, *Sept.* 5.

120 KREUGER, WERGES & Co.,

Proprietors of Clayton Brick Mills, and General Produce Dealers,
CLAYTON, IOWA, *Sept.* 22, 1870.

Messrs. ORTHWEIN & MERSMAN, St. Louis.

GENTLEMEN: Your favor of the 16th inst. rec'd, also drft for $1,500, which is placed to your credit, but is all paid out again. Wheat is coming in more freely. Hope you have sent the other fifteen hundred, ($1,500.).

If you can, please send us $3,000 per week. If wheat keeps on coming in as it has, we can get of 100 bbl. per day anyway.

E. H. K. has seen the lawyers in regard Mrs. Werges' dower; he says in this State a mortgage or note signed by the woman, forfeits everything. Enclosed please find BL. for 100 bbl. Granada; also enclosed find a letter directed to us of Winona. Have
121 you seen about another house in Boston besides Checkering, as we will make some Boston flour soon,

Yours truly,
(Signed) KRUEGER, WERGES & CO.

[Endorsed:] 1870. Clayton, Sept. 22. Krueger, Werges & Co. Filed Jun. 23, 1880. E. R. Mason, clerk.

122 And on the 23d day of June, 1880, an opinion was filed in said cause, which is in the words and figures following, to wit:

123 JOSEPH J. MERSMAN, Comp't, } In Equity.
vs.
CASPER A. WERGES and LUCY W. WERGES. } Circuit Court U. S.

This is a bill to foreclose a mortgage upon certain lands, the prop-

erty of Lucy W. Werges, situated in Clayton county, Iowa. The husband, Casper A. Werges, joined in the mortgage without any title to the lands or any interest except what the law gives him. The essential facts are as follows: Casper A. Werges with one E. H. Krueger, now deceased, was engaged in the milling business at Clayton, Clayton county, Iowa, under the firm name of Kruger, Werges & Co. E. H. Kreuger was the managing partner. Werges seems to have committing the business to his exclusive control. Krueger went to St. Louis and agreed with the complainant for a loan of $6,000 dollars to the firm Kreuger, Werges & Co.,
124 and for their use and benefit.

To secure this loan Casper A. Werges executed his note payable to the order of Kreuger, his partner. The mortgage in question was also executed and delivered with the note to Kreuger; and Kreuger, while the note was in his possession and before its delivery to the complainant, forged the name of Mrs. Werges to the note. He endorsed this forged note to the complainant, placed the mortgage in the hands of the recorder for record, and received the six thousand dollars, for which note and mortgage were given. The complainant was wholly ignorant of the forgery, and in nowise implicated in it. His perfect good faith in the transaction cannot be impugned.

125 I find the fact to be that Kreuger committed the forgery of Mrs. Werges' name. There is no direct evidence to establish the fact, but the negative and circumstantial evidence is to my mind conclusive. It is in evidence, and not, I think, seriously questioned, that when the note passed into the hands of Kreuger, the name of Mrs. Werges was not signed to it. Her name was placed upon the note by somebody who had an interest in so doing. Neither she nor her husband signed her name to the note. Her name was put to the note without her knowledge or consent. There is no evidence that the note was ever in the possession, after its delivery to Kreuger, of any person but Kreuger and the complainant. The com-
126 plainant did not commit the forgery. This is conceded; who then did commit the forgery? It must have been some one who had an interest in the note, and a motive to commit the crime. No stranger to the note without interest or motive would have forged Mrs. Werges' name, or could have done it without possession of the note. Casper A. Werges did not sign his wife's name to the note; she did not subscribe her name to it; Mersman did not. It was never, that we know of, in the hands of any stranger to the instrument. The inevitable conclusion is that Kreuger committed the forgery. We can easily find a motive moving Kreuger to use the name of Mrs. Werges as he did; he probably found or apprehended difficulty in negotiating the note to Mersman without the name of Mrs. Werges.

127 It is admitted by the complainant's counsel that it was understood by both Kreuger and Mersman that the note was to be signed by Mrs. Werges.

This being the case, Kreuger had reason to believe that he could not get the money from complainant with the signature of Mrs. Werges attached to the note.

In order, therefore, to get the money Kreuger forged the name of Mrs. Werges to the note.

Perhaps he assumed in his own mind that he might do this with impunity, if not propriety.

Since by signing her name he would not substantially increase her liability, seeing that she had agreed to pledge her land by mortgage for the debt, or it is possible that to Krueger's mind it appeared that the name of Mrs. Werges to the note would, un-
128 der the circumstances, be at most a mere matter of form.

The note and mortgage must be treated as one contract.

The parties evidently so intended them.

They were delivered together and at the same time as security for the debt.

The complainant would not otherwise have received them and advanced the money upon them.

Considered in this light they must be construed together, and their true character is that of accommodation paper. The paper was especially such as to Mrs. Werges, who received no consideration whatever for executing the mortgage. Casper A. Werges executed the note for the accommodation of the firm to which he belonged, and his wife joined him in the mortgage to secure the same. She was clearly a surety for the firm of Kreuger and Werges.

129 She executed the mortgage for the accommodation of that firm.

The note and mortgage were in form given to Kreuger and made payable to his order to enable him to indorse the note and thus transfer both note and mortgage to the complainant as security for the money to be loaned by the plaintiff to the firm.

While the note and mortgage were in the hands of Kreuger and before the transfer Kreuger forged Mrs. Werges' name to the note, he thus entirely changed her relation to the transaction.

He made her a principal, instead of a surety, in the contract evidenced by the note and mortgage.

Can it be doubted that the moment Kreuger changed the contract without Mrs. Werges' consent she was released?

She signed the contract for the accommodation of the firm.

130 A member of the firm so changed it without her authority as to make her a principal instead of an accommodation party.

Surely then the note and mortgage ceased as to her to have any validity in the hands of Kreuger, and Kreuger could transfer to the complainant no better title as against Mrs. Werges than he himself had. The contract evidenced by the note and mortgage was not Mrs. Werges' contract, after the forgery of her name to the note,

and it could not be made her contract by its transfer to the complainant.

The instrument which Mrs. Werges signed was not negotiable, and the note ceased to be so in the hands of Kreuger after he destroyed its identity, and made it a different note from that which the parties had signed by the forgery of Mrs. Werges' name to it.

Suppose a party holding negotiable paper delivered to him
131 for his own accommodation, for the purpose of un-abling him to raise money upon it, makes a material alteration of it, and then passes the paper for value to an innocent indorsee.

Can the original accommodations makers be held upon the papers? Clearly not, because the paper passed to the innocent indorsee, not the deed of the accommodation makers.

Nothing is better settled in the law of negotiable paper than that those defenses which go to the very inception and validity of the paper may always be set up against an innocent holder of the paper.

Hence, where the name of a party has been forged to a negotiable bill or note, or where it has been executed without his authority, it is utterly void as against him in the hands of an innocent
132 holder or indorsee. The same rule must undoubtedly hold as to any material alteration made after its execution or indorsement when it is sought to enforce the paper against the maker or indorser.

Suppose the holder of a note for $1,000 should change it to $2,000, and then indorse it before due for value, could the maker be made liable upon it? Would such an instrument be the deed or contract of the maker? Would the holder have any authority whatever to bind the maker by indorsing it over for value?

But it is insisted that even setting aside the note as utterly null and void, this suit can be maintained upon the mortgage alone; that Mrs. Werges undeniably executed the mortgage, and put her genuine signature to it; that the real consideration of the mortgage was the debt of six thousand dollars due from the firm of
133 Werges & Kreuger to the complainant; that the note was at most but evidence of that debt, and that the real purpose and intention of Mrs. Werges in giving the mortgage was to secure the debt.

Hence it is argued that the provision of the mortgage that it should stand as a security for the payment of the note of Casper A. Werges to E. H. Kreuger was more a matter of form than substance, and that it can be no wrong to Mrs. Werges to compel payment by the sale of her property of the very debt that she purposely pledged it to pay.

It will be seen that this argument is exceedingly ingenious and plausible. It is, however, in my judgment, untenable.

Mrs. Werges saw fit to pledge her land by mortgage to pay a note executed by her husband to Kreuger; "*Non constat*" that she
134 would have mortgaged her property in any other form.

If she had been asked to give a mortgage to secure the debt of the firm of Kreuger and Werges to the plaintiff, she might for ought we know have refused. Parties may contract in a certain form, and they have a right to do so.

The law cannot change their contract and hold them to the substance of it in a wholly different form.

The debt in this case was not Mrs. Werges'.

The consideration did not move to her, her property is bound for it only by virtue of her express contract.

She cannot be made liable on the ground that she received the consideration, and therefore that irrespective of the written evidence she is bound to pay the debt.

She can be made liable for the debt only in pursuance of
135 the terms of her written contract, and not otherwise.

In order to have fixed her liability, or rather that of her property, it would have been necessary, as the contract was actually made, for Mershan to present the note to Casper Werges, the maker, and protest it for non-payment.

Setting aside the note as a part of the contract, and proceeding directly upon the mortgage, no demand, notice, or protest was necessary.

In a word, by treating the note as a nullity, and proceeding directly on the mortgage, a collateral and conditional liability would be changed into a direct and absolute liability.

Again, as the contract was, in fact, made, Mrs. Werges was a surety for his husband, she pledged her property without consideration to her for his debt.

If we set aside and disregard the note, and proceed upon
136 the debt and mortgage directly, she becomes a joint debtor with her husband upon the face of the contract of mortgage; she is a joint obligor with her husband, and in order to entitle herself to any of the rights of a surety she must *resort* to parol evidence. Showing her true relation to the debt.

In a word, by setting aside the note to which the mortgage was a mere incident, and treating the mortgage as the evidence of indebtedness, we change the position of Mrs. Werges upon the face of the written contract from that of a surety, which she was, to that of a principal debtor, which she was not.

Again, the debt was in fact not that of her husband individually.

It was the debt of the firm. By charging her directly upon
137 the mortgage, making the debt, not the note, the basis of her liability, she becomes the surety not of her husband, which she in fact was, but the surety of the firm of Kreuger & Werges, which she in truth was not.

Lastly, if we reject the note and count exclusively upon the mortgage, the jurisdiction here clearly fails.

The mortgage was not a negotiable instrument. It was given to Kreuger in his name, and by him assigned by delivery to the complainant, Krueger, could not have sued these defendants in this

court upon the mortgage, being himself a citizen of Iowa. Therefore, his assignee, the complainant, cannot maintain an action here.

The complainant is clearly within the prohibition of the judicial act and the amendatory act of 1875.

See Sheldon *vs.* Sell, 8 How., 449.

138 [Endorsed:] Jas. J. Mersman *vs.* Casper A. Werges *et al.* Opinion. Filed Jun. 23, 1880. E. R. Mason, clerk.

139 And the complainant, to sustain the issue on his part, introduces the following evidence, to wit:

140 CIRCUIT COURT OF THE UNITED STATES, } *ss:*
District of Iowa, }

To L. L. Walbridge, a notary public in and for the county and city of St. Louis and State of Mo., for any other notary public for said in and city or county, greeting:

Know ye, that in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with full power and authority to examine Chas. F. Orthwein, William Orthwein, and Joseph J. Mersman, on their corporal oaths, as witnesses in a cause depending in the circuit court of the United States for the district of Iowa, wherein Joseph J. Mersman is plaintiff and Casper A. Werges *et al.* are defendants, on the part of the complainants upon the interrogatories annexed to this commission.

141 And, therefore, you are hereby commanded that, at a certain day and place to be appointed by you for that purpose, you do cause the said above-named witnesses to come before you, and then and there examine them, on oath, upon the said interrogatories; that you propound to the said witness the interrogatories and cross-interrogatories hereto annexed, and cause the same to be written out and the answers thereto to be inserted immediately following the respective interrogatories; that you cause the whole to be read over to the witness, and the same to be subscribed by them and duly sworn to before you; that you take said deposition in accordance with your certificate, which you will attach to the deposition of each separate witness, stating that it was subscribed

142 and sworn to by the said witness at the time and place therein mentioned; that you then seal up the whole, including this commission and the interrogatories hereto annexed, all enclosed in one envelope, and return the same to the clerk of the United States circuit court at Des Moines, Iowa; that you indorse on the outside of said envelope thus directed the title of the cause in which the deposition is to be used, and that you execute this commission with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of Aug., 1879,

and in the 104 year of the Independence of the United States of America.

[SEAL.] Attest: ED. R. MASON,
Clerk United States Circuit Court District of Iowa.

143 United States Circuit Court in and for the District of Iowa.

JOSEPH J. MERSMAN, Complainant,
vs.
CASPER A. WERGES AND LUCY W. WERGES, Defendants.
} Notice to take Depositions.

To said defendants, Casper A. Werges, Lucy W. Werges, and Galusha Parsons, their solicitor:

You are hereby notified that on the 7th day of August, 1879, we will sue out of the office of the clerk of said court a commission directed to L. L. Walbridge, a notary public in and for the county and city of St. Louis, and State of Missouri, or any other notary public in and for said city and county commanding him to take the depositions of Chas. F. Orthwein, William D. Orthwein, and
144 the complainant, Joseph J. Mersman, upon interrogatories hereto attached and such cross-interrogatories as you may file; said testimony, when taken, to be read on the hearing of the above-entitled cause on behalf of complainant.

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Comp'lt.

Service of the above notice is hereby acknowledged, and consent given that the commission may issue as therein stated.

July 26th, 1879.

(Signed) GALUSHA PARSONS,
Sol'r for Resp't.

Filed Aug. 7, 1879.

ED. R. MASON, *Clerk.*

145 *Interrogatories to be propounded to the witness, Joseph J. Mersman.*

Int. 1. State your name, age, occupation, and place of residence?

Int. 2. Are you complainant in this cause?

Int. 3. State whether or not when the note in suit first came into your possession, the name of Lucy W. Werges was subscribed thereto?

Int. 4. State what your understanding and belief was when said note was delivered to you as to whether or not the same had been executed by defendants jointly?

Int. 5. State whether or not before the filing of defendants' answer herein you had any knowledge, notice, information, or
146 intimation from any source whatever, that what purports to be the signature of the defendant, Lucy W. Werges, to

said note, was not her genuine signature, or that she had not executed said note jointly with the defendant, Casper W. Werges?

Int. 6. State whether or not any one, and if so, who acted as your agent in negotiating the loan for which said note and mortgage were given?

Int. 7. State what the fact is as to whether or not E. H. Kreuger, deceased, acted as your agent in the negotiation of said loan or in the preparation, handling, endorsing, transmitting, or delivery of the note in suit to you?

Int. 8. State all you know, if anything, as to when, where, under what circumstances, and by whom, if not by her, what pur-
147 ports to be the signature of the defendant, Lucy W. Werges, was subscribed to said note?

Int. 9. State whether or not you had paid or authorized the payment of the $6,000.00, the consideration of said note and mortgage, or any part thereof, before their actual delivery to you at the city of St. Louis?

Int. 10. State whether or not the consideration of said note and mortgage was paid by you through the firm of Orthwein & Mersman; and if you say it was, state whether or not the same or any part thereof was paid or to be paid to said Casper A. Werges or the firm of Kreuger, Werges & Co., before the actual delivery to and approval by you, at said city of St. Louis, of the note and mortgage?

148 Int. 11. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be materal to the subject of this your examination or the matters in question in this cause; if yea, set forth the s'me fully and at large in your answer?

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Complainant.

149 *Interrogatories to be propounded to the Witnesses, Chas. F. Orthwein and William D. Orthwein.*

Int. 1. What is your name, age, place of residence, and occupation?

Int. 2. State whether or not you are familiar with the handwriting of E. H. Kreuger, deceased; and if so, state what your opportunities have been for becoming familiar with the same, and examine the note in suit and state what, in your opinion, the fact is as to whether or not what purports to be the signature of Lucy W. Werges is in her handwriting.

Int. 3. State when and where you first saw said note, and whether or not when you first saw it the name of Lucy W.
150 Werges was subscribed thereto.

Int. 4. State where said notes and mortgage, given to secure the same, were first delivered to complainant Mersman, and

if the same were first so delivered at the city of St. Louis. State whether or not the same were delivered there in person by the defendants, or either of them, or any person representing them, or were transmitted from Clayton, Iowa, to said city of St. Louis by mail; and if by mail, by whom the same were so transmitted.

Int. 5. State what the fact is as to whether or not you at any time before filing the defendant's answer herein had any knowledge, notice, information or intimation from any source whatever
151 that what purports to be the signature of Lucy W. Werges to said note was not her genuine signature, or that she did not execute said note jointly with her said husband, Casper A. Werges.

Int. 7. State whether or not any one, and if so, who, acted as agent of complainant in negotiating the loan for which said note and mortgage were given.

Int. 8. State what, if you know, the fact is with respect to said E. H. Kreuger, deceased, having acted as agent of complainant in negotiating said loan, or in the preparation, handling, endorsing, transmitting, or delivery of same to complainant, or to the firm of Orthwein & Mersman.

152 Int. 8. State all you know, if anything, as to where, when, under what circumstances, why, and by whom, if not by her, what purports to be the signature of Lucy W. Werges was subscribed to said note.

Int. 9. State, if you know, whether or not complainant, or the firm of Orthwein & Mersman, or any one else, for him, had paid or advanced the $6,000.00, the consideration of the said note and mortgage, or any part thereof, before the actual delivery of said note and mortgage at the said city of St. Louis.

Int 10. State whether or not the $6,000.00, the consideration of the note and mortgage in suit, was paid by complainant, through the firm of Orthwein & Mersman; and, if you say it was, state
153 whether or not the same, or any part thereof, was paid, or to be paid to the defendant, Casper A. Werges, or to Krueger, Werges & Co., before the actual delivery to and approval by complainant at the city of St. Louis, of said note and mortgage.

Int. 11. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause; if yea, set forth the same fully and at large in your answer.

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Complainant.

154 [Endorsed:] In U. S. C. C. Joseph J. Mersman, comp't, *vs.* Casper A. Werges *et al.* Notice and ints. to take deposition. Chas. F. Orthwein, Wm. D. Orthwein, Joseph J. Mersman. Filed Aug. 7, 1879. Ed. R. Mason, clerk. Wright, Gatch & Wright, for complt.

155 Circuit Court of the United States for the District of Iowa.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES and LUCY W. WERGES.

Cross-interrogatories to be propounded to the Witness, Joseph J. Mersman.

1. If in answer to direct interrogatory No. 3 you say that the note referred to, at any time, came into your possession; state *when* and *how* it so came into your possession; if by mail, produce the letter enclosing the same; state from whose hands you received the letter, and whether the same had been opened before it came into your hands?

156 2. How long have you lived in the city of St. Louis; and state fully and particularly in what business you have been engaged during the entire time of your residence there?

3. Were you at any time connected with a firm doing business under the name of Haenschen & Orthwein, and whether you were or were not so connected; give the names of the firm, if you know them, their business, and during when, at what time, and where carried on, and whether either member of said firm was in any way related to you?

4. State whether you in any way, either individually or as a member of a firm, succeeded to the business of the firm of Haenschen & Orthwein; and if so, when and how?

5. State whether you ever saw either Casper A. Werges or Lucy W., his wife; and if so, when and where?

157 6. Did you ever receive a letter from Casper A. Werges or his wife; if so, produce any and all letters so received, and let them be attached as a part of your answer hereto.

7. Produce all letters received by you, or by any firm of which you are or have been a member from Krueger & Werges, and let them be attached to your answer hereto.

8. State whether you or any firm of which you were a member kept copies of letters written by you or them to Krueger and Werges; and if so, produce such copies and let them be made a part of your answer hereto.

9. If, in answer to direct interrogatory 4, you speak of your understanding and belief as to the matters of which you are

158 there interrogated, state upon what such understanding or *belief* was based; if upon coversation, state when and with whom such conversation were had, and fully and particularly all that was said in each of them. If upon letters or other written statements, produce each and every letter or other writing upon which you claim in any way, or in any degree, to have arrived at such understanding or belief.

10. If you say that the note in question was accompanied by a mortgage, state how you know that fact, and particularly whether

you were able to read them, and if you say that you were not, state whether they were read to you by any one; and if so, by whom?

11. If you say that any one acted as your agent in negotiating the loan for which you claim said note and mortgage were
159 given, state whether his appointment was oral or in writing; if oral, state when and where the conversation occurred, and fully and particularly all that was said, giving the names of all persons present?

If in writing, produce such writing, or a copy thereof, and let the same be made a part of your answer hereto.

12. State whether you were at any time prior to this day, furnished with a copy of the direct interrogatories upon which this examination is being made, or whether the same were at any time read to you or in your presence; and, if so, how or by whom you were furnished with such copy, and when, and if any letter accompanied the same; and, if so, produce it and let it be made a part of your answer hereto; and if you say the same were read in your presence, state when and by whom, and how they came into
160 the possession of the party who read them.

13. If in answer to any of the direct interrogatories herein you add anything to your former examination, or in any way changed the same, state why you do so; what means of knowledge you now have that you had not at that time, or any information received since then, and from whom received; and if in writing, produce the same; and state particularly whether your attention has been called to the matters of which you are now being examined by letter; and, if so, from whom the same was received, and produce the same, and let the same be made a part of your answer hereto.

161 14. If in answer to direct interrogatory 7 you give it as your opinion that said E. H. Kreuger did not act as your agent in the several matters of which you are there interrogated, state whether you were present at any of the times to which they refer, and if you were not, how you know what he did and how he acted, and what you mean by negotiating the said loan, and if you in any way change or add anything to your former testimony upon that subject. State why you do so. State when and from whom you obtained any further knowledge of the matters referred to, that you possessed at the time of your former examinations.

15. If in answer to direct int. 9 you speak of the payment
162 of the sum there referred to, state how it was paid. If in currency, into whose hands, and where; if by draft, produce the same and let it be attached to your answer hereto, and let an exact copy of all entries in respect to such payment contained in your books or the books of any firm of which you were a member, be made a part of your answer hereto, giving the book, the page, heading, and the date literally as the same appear.

16. If in answer to direct int. 10 you say such payment was made through the firm of Orthwein & Mersman, state whether you are

the Merseman of that firm, who has charge of the firm book, and let exact copies of all entries which they contain in respect to such payment, and all writings, letters, checks, or drafts in any way relating to it, be made part of your answer hereto.

163 If you say the money was not to be paid until the time named in that interrogatory, state particularly and minutely every fact and circumstance upon which you base that statement, including every conversation, with the time, place, and person, and every letter or other writing, and if any writing is referred to, if the original is under your control, let it be attached to your answer hereto, and if not under your control, state where it is, and let a copy thereof be so attached.

17. When did you first learn, and from whom, of the dismissal of your former bill herein, and produce the letter and let it be made a part of your answer hereto.

164 18. State the particular place of this examination, as at whose office, and give the names of all persons present at any time during each examination, and whether any of your answers as they now appear were in any way changed by you or the commission from the former language in which they were first given; and if so, at whose suggestion.

165 *Interrogatories to be put upon the Cross-Examination to Charles F. Orthwein and William D. Orthwein.*

1. How long have you resided in the city of St. Louis; in what business have you been engaged, and if you had partners, give their names?

2. Are you acquainted with Joseph J. Mersman; were you at any time connected with him in business; and, if so, when and during what time and in what business, and are you in any way related to him?

3. Are you acquainted with Lucy W. Werges; if so, when and where did you first see her?

4. If in answer to int's 2 and 3 in your direct examination
166 you say you have seen the note and mortgage there referred to, state in whose hands the same were when you first saw them, or either of them, and, if you know, state whether the same were sent by mail from Iowa to St. Louis, and, if they were so sent, how you know that fact.

5. If, in answer to int. 4, upon your direct examination, you say said note and mortgage were received in St. Louis by mail, state how they were enclosed when so received, how you know that fact, whether anything else was contained in the same enclosure, and whether the package was delivered to Mr. Mersman, and if the enclosed papers were read to him; state by whom, produce the accompanying letter, and let it be made a part of your answer hereto.

167 6. If you have control of the books of either of the firms referred to by Mr. Mersman in his examination, or access to

them, examine all entries which they contain in respect to the moneys secured by said note and mortgage, state in what books they are to be found, at what pages, and let an exact copy, with the dates as they there appear, be attached to and made a part of your answer hereto.

7. Did you ever have any correspondence with E. H. Krueger, or with the firm of Krueger and Werges, in respect to the said note and mortgage or the moneys loaned thereupon or secured thereby; and, if so, produce all letters received by you, and copies of all letters written by you, and let the same be made parts of your answer hereto.

168 8. Were you present at the examination of Mr. Mersman herein; were you formally examined as a witness in this action? If so, when and where, at whose office, and give the names of all the persons present at said examination.

10. If you say that you have been previously examined, state whether upon such examination you did or did not testify fully to all the facts of which you then had any knowledge as to the said note and mortgage, and the purpose for which, and the circumstances under which they were executed.

11. If upon your present examination you in any way add to or change the testimony then given by you?

And particularly whether you have seen *and* read or heard. read any letter in relation to the present condition of this
169 case, and why a second examination has become necessary, and let such letter be made a part of your answer hereto?

12. If in answer to direct int. 4 you speak of any persons representing these deefendants, or either of them, state fully and particularly how you know that he had any authority to represent them.

13. If you answer direct int. No. 7 affirmatively, state all the knowledge you have in respect to the matter fully and particularly.

14. There are two interrogatories each No. 8. State fully and particularly how you obtained a knowledge of the facts to which they relate; whether before or since your former examination, and whether you were present at the occurrence of any of the
170 facts testified to by you; and if so, give the names of all other persons who were present at the times and places. If you refer to letters or other writings as the sources of your knowled, let them be attached as a part of your answer hereto.

15. If you answer the 9th direct interrogatory affirmatively, state how you obtained your knowledge.

State at what of the occurrences testified to you were present; if you have any writings in respect to the same, let them be attached to your answer hereto.

16. If you answer direct int. No. 10 in the negative, state all of the knowledge you have in respect thereto, giving with fullness and particularity all the sources of your knowledge.

And state whether anything has occurred since your for-

171 mer examination which enables you to testify more fully than you there, testified, and if so, what?

17. If you say that you know anything as to the manner in which the six thousand dollars was paid, state how you obtained your knowledge upon that subject; if from letters or other writings, produce them and let them be made a part of your answer hereto.

18. State at what place you are now being examined, and give the names of all persons who have been present at any portion of your examination; whether any one of them has acted as counsel for Mr. Mersman, and whether any of your answers have been changed at the suggestion of any person present, or whether, in making your answers, you have referred to any books or papers, and if so,

172 what books or papers, and let them, if in the form of letters, be attached hereto, and if in any other form, let the copies of them be so attached.

(Signed) GALUSHA PARSONS,
For Def't.

173 [Endorsed:] U. S. C. C. J. J. Mersman *vs.* Casper A. Werges *et al.* Notice or interrog's to take depositions of Jas. J. Mersman, Chas. F. Orthwein, Wm. D. Orthwein. Filed Aug. 7, 1879. Ed. R. Mason, clerk.

174 *Notary Public's Subpœna.*

(Wagner's Statutes, page 959, chapter 101.)

The State of Missouri to Joseph J. Mersman, Greeting:

You are hereby commanded that, setting aside all manner of excuse and delay, you be and appear before Phillip Stock, a notary public within and for the city of St. Louis, in the State of Missouri, on the 29th day of August, A. D. 1879, at the hour of eight o'clock in the forenoon of said day, at my office, room 24, No. 506 Olive street, in said city, and State of Missouri, then and there to testify, and the truth to say, in a certain cause now pending in the circuit court of the United States for the district of Iowa, in the State of Iowa, wherein Joseph J. Mersman is plaintiff, and Casper A. Werges and Lucy W. Werges are defendants, on the part of the plaintiff. Hereof fail not at your peril.

And the person or officer serving this writ is commanded

175 to have the same before the said Philip Stock, notary public, at the time and place aforesaid, certifying how he executed the same.

Witness, Philip Stock, notary public within and for the city and State, with my notarial seal hereto affixed at office in said city, on this the 28th day of August, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

176 *Return.*

I certify that I served the within subpœna in the city of St. Louis, and State of Missouri, on the twenty-ninth day of August, 1879, by reading the same to the within-named Joseph J. Mersman.

(Signed) CHAS. SCHMELTZ.

Sworn to and subscribed before me, this 29th day of August, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

177 *Notary Public's Subpœna.*

(Wagner's Statutes, page 959, chapter 101.)

The State of Missouri to Charles F. Orthwein, Greeting:

You are hereby commanded that, setting aside all manner of excuse and delay, you be and appear before Philip Stock, a notary public within and for the city of St. Louis, in the State of Missouri, on the 5th day of September, A. D. 1879, at the hour of eight o'clock in the forenoon of said day, at my office, room 24, No. 506 Olive street, in said city and State of Missouri, then and there to testify, and the truth to say, in a certain cause now pending in the circuit court of the United States for the district of Iowa, in the State of Iowa, wherein Joseph J. Mersman is plaintiff, and Casper A. Werges and Lucy W. Werges are defendants, on the part of the plaintiff. Hereof fail not at your peril.

And the person or officer serving this writ is commanded
178 to have the *the* same before the said Philip Stock, notary public, at the time and place aforesaid, certifying how he executed the same.

Witness, Philip Stock, notary public within and for the city and State, with my notarial seal hereto affixed, at office in said city, on this the 4th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

179 *Return.*

I certify that I served the within subpœna in the city of St. Louis, and State of Missouri, on the fourth day of September, 1879, by reading the same to the within-named Charles F. Orthwein.

(Signed) CHAS. SCHMELTZ.

Sworn to and subscribed before me, this 4th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

180 *Notary Public's Subpœna.*

(Wagner's Statutes, page 959, chapter 101.)

The State of Missouri to William D. Orthwein, Greeting:

You are hereby commanded that, setting aside all manner of excuse and delay, you be and appear before Philip Stock, a notary public, within and for the city of St. Louis, in the State of Missouri, on the 9th day of September, A. D. 1879, at the hour of eight o'clock in the forenoon of said day at my office, room 24, No. 506 Olive street, in said city and State of Missouri, then and there to testify, and the truth to say, in a certain cause now pending in the circuit court of the United States for the district of Iowa, in the State of Iowa, wherein Joseph J. Mersman is plaintiff, and Casper A. Werges and Lucy W. Werges are defendants, on the part of the plaintiff. Hereof fail not at your peril.

And the person or officer serving this writ is commanded
181 to have the same before the said Philip Stock, notary public, at the time and place aforesaid, certifying how he executed the same.

Witness, Philip Stock, notary public within and for city and State, with my notarial seal hereto affixed, at office in said city, on this the 8th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

Return.

I certify that I served the within subpœna in the city of St. Louis, and State of Missouri, on the eighth day of September, 1879, by reading the same to the within-named William D. Orthwein.

(Signed) CHAS. SCHMELTZ.

Sworn to and subscribed before me, this 8th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

182 Depositions of witnesses produced, sworn, and examined at the office of Philip Stock, notary public, No. 506 Olive street, city of St. Louis, and State of Missouri, before me, Philip Stock, a notary public within and for the city of St. Louis, and State of Missouri, in a certain cause now pending in the United States circuit court, in and for the district of Iowa, State of Iowa, between Joseph J. Mersman, plaintiff, and Casper A. Werges and Lucy W. Werges, defendants, on the part of the plaintiff.

Joseph J. Mersman, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. State your name, age, occupation, and place of residence.

Ans. to int. 1. My name is Joseph J. Mersman; I am fifty-five years of age, and reside No. 1600 Mississippi avenue, in the city of St. Louis, and State of Missouri.

183 Int. 2. Are you complainant in this cause?

Ans. to int. 2. I am the complainant in this cause.

Int. 3. State whether or not when the note in suit first came into your possession the name of Lucy W. Werges was subscribed thereto?

Ans. to int. 3. The name of Lucy W. Werges was subscribed to the note in suit before it first came into my possession.

Int. 4. State what your understanding and belief was when said note was delivered to you; as to whether or not same had been executed by defendants jointly.

Ans. to int. 4. I have no understanding or belief about it, but know positively that when the note was received by me it had the signatures of both the defendants; its because they had been read to me.

184 Int. 5. State whether or not before the filing of defendants' answer herein you had any knowledge, notice, information, or intimation from any source whatever that what purports to be the signature of the defendant, Lucy W. Werges, to said note was not her genuine signature, or that she had not executed said note jointly with the defendant, Casper A. Werges.

Ans. to int. 5. I first was informed by my attorneys, I think, not more than eight or ten months ago; I do not know when defendants filed their answer, and of course, previous to this information by my attorneys, I had no intimation or knowledge of such intentions on the part of the defendants or Mrs. Lucy W. Werges.

Int. 6. State whether or not any one, and, if so, who, acted as your agent in negotiating the loan for which said note and mortgage were given.

185 Ans. to int. 6. Nobody acted for me in this transaction, and in fact I have never had any agent to make any loan for me at any time; of course I employ legal advice in examining securities, which are given me for any loan made by me, and had such a statement from a good legal firm, to the effect that if the wife signs the note it conveys her dower as effectually as in a deed of trust.

Int. 7. State what the fact is as to whether or not E. H. Krueger, deceased, acted as your agent in the negotiation of said loan or in the preparation, handling, endorsing, transmitting, or delivery of the note in suit to you.

Ans. to int. 7. E. H. Krueger, deceased, was not my agent in the negotiation of the loan, but he was acting as the agent and for the convenience of Casper A. Werges and the firm of Krueger,

186 Werges & Co. in effecting the same.

Int. 8. State all you know, if anything, as to when, where, under what circumstances, and by whom, if not by her, what purports to be the signature of the defendant, Lucy W. Werges, was subscribed to said note.

Ans. to int. 8. I do not know anything as to when, where, under

what circumstances, and by whom the signature of Lucy W. Werges was subscribed to said note.

Int. 9. State whether or not you had paid, or authorized the payment of, the $6,000, the consideration of said note and mortgage, or any part thereof, before their actual delivery to you at the city of St. Louis.

Ans. to int. 9. I had not authorized the payment of the $6,000, or any part thereof, before the delivery of the note and mort-
187 gage to me, in fact, I had refused all importunities of the firm of Krueger, Werges & Co. to advance money on their assurance that security would be made perfectly satisfactory to me as promised.

Int. 10. State whether or not the consideration of said note and mortgage was paid by you through the firm of Orthwein & Mersman, and if you say it was, state whether or not the same, or any part thereof, was paid, or to be paid to said Casper A Werges, or the firm of Krueger, Werges & Co., before the actual delivery to and approval by you at said city of St. Louis of the note and mortgage.

Ans. to int. 10. The consideration of said note and mortgage was paid by and through the firm of Orthwein & Mersman, but not, nor was it to be paid, or any part thereof, until the note and mortgage was received and approved by me at the city of St. Louis.

188 Int. 11. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subect of this your examination or the matters in question in this cause; if yea, set forth the same fully and at large in your answer.

Ans. to int. 11. I desire to make no statement for my personal benefit, except what is elicited by direct or cross-examination.

Cross-interrogatories.

Cross-int. 1. If, in answer to direct interrogatory No. 3, you say that the note referred to at any time came into your possession, state *when* and *how* it so came into your possession; if by mail, produce the letter inclosing the same, state from whose hands you
189 received the letter, and whether the same had been opened before it came into your hands.

Ans. to cross-int. 1. The package containing the note and mortgage came into my possession either by express or mail, either on the 2d or 3d day of September, 1870, but whether accompanied by a letter or not I am unable to state; the package was opened at my request, either by Mr. Charles F. Orthwein or the then book-keeper, Henry Hiemenz, Jr., and contents read to me.

Cross-int. 2. How long have you lived in the city of St Louis, and state fully and particularly in what business you have been engaged during the entire time of your residence there?

Ans. to cross-int. 2. I have resided in the city of St. Louis since

the early part of 1849, and from that time up to August 1st,
190 1867, was associated with one John C. Nulsen in the wholesale liquor business, under the firm name of Nulson & Mersman; was out of business until July 9th, 1870, when I formed a partnership with Charles F. Orthwein, in the commission business, under the firm name of Orthwein & Mersman, and of which firm I am still a member.

Cross-int. 3. Were you at any time connected with a firm doing business under the name of Haenschen & Orthwein, and whether you were or were not so connected; give the names of the firm, if you know their business, and during when and what time, and where carried on, and whether either member of said firm was in any way related to you?

Ans. to cross-int. 3. Never was connected in any way with the firm of Haenschen & Orthwein; I think the firm was doing
191 a commission business, and was composed, I believe, of one Gustavus W. Haenschen and my present partner, Charles F. Orthwein; my relationship as to either party of that firm, is that Charles F. Orthwein has married a grand-daughter of my mother-in-law, but not my daughter.

Cross-int. 4. State whether you in any way, either individually or as a member of a firm, succeeded to the business of the firm of Haenschen & Orthwein, and if so, when and how?

Ans. to cross-int. 4. I did not succeed any one; I did not purchase any one's interest, but on July 9th, 1870, formed a partnership with Charles F. Orthwein, as I have stated before.

Cross-int. 5. State whether you ever saw either Casper A. Werges or Lucy W., his wife; and if so, when and where?

192 Ans. to cross-int. 5. Can not see; have never spoken to either Casper A. Werges or Lucy W., his wife.

Cross-int. 6. Did you ever receive a letter from Casper A. Werges or his wife; and if so, produce any and all letters so received, and let them be attached as a part of your answer hereto?

Ans. to cross-int. 6. I have received two letters from Casper A. Werges; they are, and have been for some time, either in your court or in the hands of my attorneys, Messrs. Wright, Gatch & Wright.

Cross-int. 7. Produce all letters received by you, or by any firm of which you are or have been a member, from Kreuger & Werges, and let them be attached to your answer hereto.

Ans. to cross-int. 7. All letters received by me, or the firm
193 of Orthwein & Mersman, from Krueger & Werges relating to the loan made by me to Casper A. Werges and Lucy W., his wife, are, and have been for some time, either in your court or in the hands of my attorneys, Messrs. Wright, Gatch & Wright.

Cross-int. 8. State whether you, or any firm of which you were a member, kept copies of letters written by you or them to Kreuger & Werges; and if so, produce such copies and let them be made a part of your answer hereto.

Ans. to cross-int. 8. I have no copies of the two letters dictated by me and addressed to Casper A. Werges, and the copies of letters written by Orthwein & Mersman appertaining to my loan are either in your court or in the hands of my attorneys, Messrs. Wright, Gatch & Wright.

Cross-int. 9. If, in answer to direct interrogatory 4, you
194 speak of your understanding and belief as to the matters of which you are there interrogated, state upon what such understanding or belief was based; if upon conversation, state when and with whom such conversations were had, and fully and particularly all that was said in each of them; if upon letters or other written statements, produce each and every letter or other writing upon which you claim in any way, or in any degree, to have arrived at such understanding or belief.

Ans. to cross-int. 9. As I have stated before there was no understanding or belief. When I received the note and mortgage they were executed by defendants jointly; in a previous deposition given by me in the same case I have fully stated the transaction which, in a nutshell, was that as soon as I was put into possession of the proper papers conveying the title of Caper A. Werges' farm
195 of 240 acres and his wife's dower therein to me, the amount of the loan, to wit, the sum of $6,000.00 would be forthcoming.

Cross-int. 10. If you say that the note in question was accompanied by a mortgage, state how you know that fact, and particularly whether you were able to read them; and if you say that you were not, state whether they were read to you by any one, and if so, by whom?

Ans. to cross-int. 10. The note and mortgage came together. As I am blind, both were read to me; do not know which one first; they were read to me either by my partner, Mr. Charles F. Orthwein, or Henry Hiemenz, Jr., our then bookkeeper.

Cross-int. 11. If you say that any one acted as your agent in negotiating the loan for which you claim said note and mortgage were given, state whether his appointment was oral or in
196 writing. If oral, state when and where the conversation occurred, and fully and particularly all that was said, giving the names of all persons present. If in writing, produce such writing, or a copy thereof, and let the same be made a part of your answer hereto.

Ans. to cross-int. 11. As I have stated in answer to a direct interrogatory, I have never employed an agent for negotiating a loan I have ever made.

Cross-int. 12. State whether you were at any time prior to this day furnished with a copy of the direct interrogatories upon which this examination is being made, or whether the same were at any time read to you or in your presence; and if so, how or by whom you were furnished with such copy, and when, and if any letter accompanied the same, and if so, produce it and let it be

197 made a part of your answer hereto; and if you say the same were read in your presence, state when and by whom and how they came into the possession of the party who read them.

Ans. to cross-int. 12. I have never received a copy of the direct interrogatories or had any knowledge of any part of them.

Cross-int. 13. If in answer to any of the direct interrogatories herein you add anything to your former examination, or in any way change the same, state why you do so, what means of knowledge you now have that you had not at that time, or any information received since then, and from whom received, and if in writing, produce the same, and state particularly whether your attention has been called to the matters of which you are now being exam-
198 ined by letter; and if so, from whom the same was received, and produce the same and let the same be made a part of your answer hereto.

Ans. to cross-int. 13. In my former examination, lasting the better part of two days, I must certainly have stated a great many things which I knew better at that time than I know now, having at that time letters, &c., to refresh my memory which have since wandered to Des Moines, Iowa. Now, if the Lord Almighty should send me to internal perdition, because of the many statements then made should not exactly correspond with my present ones, and the Lord Almighty make no allowance for imperfect memory, then my chances in meeting my interrogator in the blissful hereafter might be somewhat problematical.

Cross-int. 14. If, in answer to direct interrogatory 7, you
199 give it as your opinion that said E. H. Krueger did not act as your agent, the several matters of which you are there interrogated, state whether you were present at any of the times to which they refer; and if you were not, how you know what he did and how he acted, and what you mean by negotiating the said loan, and if you, in any way, change or add anything to your former testimony upon that subject; state why you do so, state when and from whom you obtained any further knowledge of the matters referred to that you possessed at the time of your former examination.

Ans. to cross-int. 14. I have never been at Clayton City in my life; have no idea what conversations passed between E. H. Krueger, Casper A. Werges, and his other partner, whose name I believe is Wm. Krueger. In my letter to the firm of Krueger, Werges
200 & Co., dictated by me and written by William D. Orthwein, I clearly stated, at least as I thought then, the kind of security I required in making the loan.

This letter I have every reason to believe is in your court, as my lawyers have quoted extracts therefrom.

Cross-int. 15. If, in answer to direct interrogatory 9, you speak of the payment of the sum there referred to, state how it was paid, if in currency, into whose hands, and where; if by draft, produce the same, and let it be attached to your answer hereto, and let an exact copy of all entries in respect to such payment contained in your

books, or the books of any firm of which you were a member, be made a part of your answer hereto, giving the book, the page, heading, and the date, literally as the same appear.

Ans. to cross-int. 15. I am quite confident that I paid the
201 money in a certified check that I had received the same day from Convoy Brothers, of St. Louis, in the recorder's office of this city, immediately after releasing there a deed of trust, which I had held some years against them for $6,000.00, also, then took the check down to our office with instructions to place the same to the credit of Krueger, Werges & Co. The money was then paid by the firm of Orthwein & Mersman to Krueger, Werges & Co., sometimes in drafts on New York, and sometimes in currency sent to them by express, and in such sums as they had written for. Whatever was paid in drafts were drafts drawn on some firm in New York, where we shipped flour to, and of course these drafts are kept by those firms as vouchers, and am therefore unable to produce them. As to the entries in our books regarding
202 these payments to Krueger, Werges & Co., an exact copy thereof is now in your court at Des Moines; at least, so I am informed by Mr. D. Orthwein.

Cross-int. 16. If, in answer to direct interrogatory 10, you say such payment was made through the firm of Orthwein & Mersman, state whether you are the Mersman of that firm, who has charge of the firm books, and let exact copies of all entries which they contain, in respect to such payment, and all writings, letters, checks, or drafts, in any way relating to it, be made part of your answer hereto; if you say the money was not to be paid until the time named in that interrogatory, state particularly and minutely every fact or circumstance upon which you base that statement, including every conversation, with the time and place and person, and every letter or other writing, and if any writing is referred to,
203 if the original is under your control, let it be attached to your answer hereto; and if not under your control, state where it is, and let a copy thereof be so attached.

Ans. to cross-int 16. I am the Mersman of that firm; at that time Messrs. Wm. D. Orthwein and Henry Hiemenz, Jr., had charge of our books; an exact copy of our books, as before stated, regarding these payments to Krueger, Werges & Co., as well as all letters appertaining to the loan and payment must be in your court or in the hands of my attorneys, Messrs. Wright, Gatch & Wright, as I cannot find anything appertaining to this transaction; I think E. H. Krueger was here from about the 8th to the 12th of August, 1870, during which time he succeeded in persuading me to make this loan to Casper A. Werges; immediately on his return home
204 my firm received a letter, I think from Krueger, Werges & Co., informing us that Casper A. Werges was willing to give a deed of trust on his farm, and requesting us to send immediately, I think it was $2,000.00, to start the mill; I refused to send any money until the papers were made out and in proper order; after

this long lapse of time, I do not pretend to remember every fact or circumstance particularly and minutely, but I know my business habits, having made a good many loans in my life, this would be the only one where I should have paid the money without having the proper security in my hands; the letters referred to above must be in Des Moines, as they cannot be found here.

Cross-int. 17. When did you first learn, and from whom, of the dismissal of your former bill herein, and produce the letter and let it be made a part of your answer hereto?

205 Ans. to cross-int. 17. I did not know, nor do I now know, that any former bill in this suit had been dismissed, at least I did not understand it so; some eight or ten months ago I think I received information from my attorney that a new idea had been started by the opposing party, to wit: that Mrs. Lucy W. Werges pretends not to have signed the note; I have looked for, but cannot find this letter; I suppose at the time of receiving it I attached no importance to its preservation.

Cross-int. 18. State the particular place of this examination as at whose office, and give the names of all persons present at any time during such examination, and whether any of your answers, as they now appear, were in any way changed by you, or the commissioner, from the former language in which they were first given; and if so, at whose suggestion?

206 Ans. to cross-int. 18. At the office of Phillip Stock, the notary public, room 24, No. 506 Olive street, city of St. Louis; nobody present except the notary, my leader, whose name is Conrad, and myself; my answers to the direct and cross-interrogatories propounded to me have not been changed in any way from the form or language in which they were first given by me.

(Signed) JOS. J. MERSMAN.

207 I, Philip Stock, a notary public within and for the city of St. Louis, and State of Missouri, do hereby certify that Joseph J. Mersman, the deponent, whose place of residence is No. 1600 Mississippi avenue, city of St. Louis, and State of Missouri, was by me sworn to testify the whole truth of his knowledge touching the matter in controversy in the cause aforesaid; that deponent was examined, and his examination reduced to writing by Philip Stock, who is neither of the parties, attorney of neither, nor in any wise interested in the event of the suit; and after being by me carefully read over to the said deponent, the same was sworn to and subscribed by the said deponent in my presence on the 29th day of August, A. D. 1879, between the hours of eight o'clock a. m.

208 and six o'clock p. m. of said day, at my office, room 24, No. 506 Olive street, city of St. Louis, and State of Missouri.

Given and certified under my hand and seal official, this 29th day of August, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

209 Charles F. Orthwein, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, place of residence, and occupation?

Ans. to int. 1. Charles D. Orthwein; 40 years old; city of St. Louis; commission business.

Int. 2. State whether or not you are familiar with the handwriting of E. H. Krueger, deceased; and if so, state what your opportunities have been for becoming familiar with the same, and examine the note in suit, and state what, in your opinion, the fact is as to whether or not what purports to be the signature of Lucy W. Werges is in his handwriting.

Ans. to int. 2. I have been familiar with Krueger's handwriting through many years' correspondence; the signature of Mrs.
210 Lucy W. Werges on the note in question is in German letters; do not remember of ever having seen Krueger's handwriting in German letters, hence could not undertake to pass an opinion on that question; the note I herewith attach to my deposition as Exhibit "B."

Int. 3. State when and where you first saw said note, and whether or not when you first saw it the name of Lucy W. Werges was subscribed thereto?

Ans. to int. 3. I saw the note when it was received by Orthwein & Mersman, in September, 1870, and it had the name of Lucy W. Werges subscribed thereto.

Int. 4. State where said note and mortgage given to secure the same were first delivered to complainant, Mersman, and if the same were first so delivered at the city of St. Louis, state whether
211 the same were delivered there in person by the defendants, or either of them, or any person representing them, or were transmitted from Clayton, Iowa, to said city of St. Louis by mail, and if by mail, by whom the same were so transmitted.

Ans. to int. 4. The note and mortgage were received through mail by Orthwein & Mersman, and by them handed to Mr. Mersman.

Int. 5. State what the fact is as to whether or not you at any time before the filing of defendants' answer herein, had any knowledge, notice, information, or intimation, from any source whatever, that what purports to be the signature of Lucy W. Werges to said note was not her genuine signature, or that she had not executed said note jointly with her said husband Casper A. Werges.

212 Ans. to int. 5. Never had any such knowledge, notice, information, or intimation before the filing of defendants' answer.

Int. 7. State whether or not any one, and if so, who, acted as agent of complainant in negotiating the loan for which said note and mortgage were given.

Ans. to int. 7. Mr. Mersman had no agent to negotiate said loan.

Int. 8. State what, if you know, the fact is with regard to said E. H. Kruger, deceased, having acted as agent of complainant in negotiating said loan, or in the preparation, handling, endorsing, transmitting, or delivery of same to complainant or the firm of Orthwein & Mersman.

213 Ans. to int. 8. E. H. Krueger, in attending to the transmitting and delivering of the papers, did not act as agent of Mr. Mersman, but for his own firm and Lucy W. Werges.

Int. 8. State all you know, if anything, as to where, when, under what circumstances, why, and by whom (if not by her) what purports to be the signature of Lucy W. Werges was subscribed to said note.

Ans. to int. 8. Know nothing about all that.

Int. 9. State, if you know, whether or not complainant, or the firm of Orthwein & Mersman, or any one else for him, had paid or advanced the $6,000, the consideration of the said note and mortgage, or any part thereof, before the actual delivery of said note and mortgage at the said city of St. Louis.

214 Ans to int. 9. The $6,000 were paid to Orthwein & Mersman for account of Krueger, Werges & Co. by Mr. Mersman. The first payment was made a few days prior to the receiving of the note and mortgage, and at the request of Krueger, Werges & Co., upon their assurance that note and mortgage had been executed and were in the process of record.

Int. 10. State whether or not the $6,000, the consideration of the note and mortgage in suit, was paid by complainant through the firm of Orthwein & Mersman; and if you say it was, state whether or not the same, or any part thereof, was paid, or to be paid, to the defendant, Casper A. Werges, or to Krueger, Werges & Co., before the actual delivery to, and approval by, complainant at the said city of St. Louis of said note and mortgage.

215 Ans. to int. 10. The $6,000 was paid to Krueger, Werges & Co. through the firm of Orthwein & Mersman. Orthwein & Mersman, as soon as the loan was agreed upon by complainant and defendants, advanced sums of the money before the papers were received to Krueger, Werges & Co. upon their assurance that papers had been executed.

Int. 11. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. to int. 11. I have fully stated in a former deposition given by me in this cause all I know about this loan.

216 *Cross-examination.*

Cross-int. 1. How long have you resided in the city of St. Louis; in what business have you been engaged; and if you have had partners, give their names?

Ans. to cross-int. 1. I have resided in the city of St. Louis for the last 23 years, and have been engaged in the commission business with Gustavus H. Haenschen, under the firm name of Haenschen & Orthwein, and with Joseph J. Mersman, under the firm name of Orthwein & Mersman.

Cross-int. 2. Are you acquainted with Joseph J. Mersman; were you at any time connected with him in business; and, if so, when and during what time, and in what business, and are you in any way related to him?

217 Ans. to cross-int. 2. I am acquainted with Joseph J. Mersman; he is my partner in the commission business since July, 1870, and my wife is a niece of his wife.

Cross-int. 3. Are you acquainted with Lucy W. Werges; if so, when and where did you first see her?

Ans. to cross-int. 3. I am acquainted with Mrs. Lucy W. Werges; have seen her several times; the first time on their farm, but don't remember when.

Cross-int. 4. If in answer to int's 2 and 3 in your direct examination you say you have seen the note and mortgage there referred to, state in whose hands the same were, when you first saw them, and if you know, state whether the same were sent by mail from Iowa to St. Louis, and if they were so sent, how you know

218 that fact.

Ans. to cross-int. 4. Orthwein & Mersman received them by mail in an envelope, which I herewith attach to my deposition as Exhibit "A."

Cross-int. 5. If in answer to int. 4, upon your direct examination, you say said note and mortgage were received at St. Louis by mail, state how they were enclosed when so received, how you know that fact, whether anything else was contained in the same enclosure, and whether the package was delivered to Mr. Mersman, and if the enclosed papers were read to him, state by whom; produce the accompanying letter and let it be made a part of your answer hereto.

Ans. to cross-int. 5. Don't know of any other papers or matters having been received in some enclosure; the papers received

219 were read to Mr. Mersman in our office, but by whom I am unable to state.

Cross-int. 6. If you have control of the books of either of the firms referred to by Mr. Mersman in his examination, or access to them, examine all entries which they contain in respect to the moneys secured by said note and mortgage; state in what books they are to be found, at what pages, and let an exact copy with the dates as they there appear be attached to and made a part of your answer hereto.

Ans. to cross-int. 6. I have fully answered this interrogatory in my direct examination.

Cross-int. 7. Did you ever have any correspondence with C. H. Krueger, or with the firm of Krueger & Werges in respect to the said note and mortgage, or the moneys loaned thereupon or secured

thereby, and if so, produce all letters received by you
220 and copies of all letters written by you, and let the same be made parts of your answer hereto?

Ans. to cross 7. All correspondence pertaining to this suit is, as far as I know, either in your court or in the hands of the attorneys.

Cross-int. 8. Were you present at the examination of Mr. Mersman herein?

Ans. to cross-int. 8. No.

Cross-int. 9. Were you formerly examined as a witness in this action; if so, when and where, at whose office, and give the names of all the persons present at such examination?

Ans. to cross-int. 9. I have been examined before in this case at the office of L. L. Walbridge, notary public, in the city of St. Louis, but don't know who was present.

221 Cross-int. 10. If you say that you have been previously examined, state whether upon such examination you did or did not testify fully to all of the facts of which you then had any knowledge as to the said note and mortgage, and the purpose for which, and the circumstances under which they were executed.

Ans. to cross-int. 10. I answered to the questions asked of me the best of my knowledge.

Cross-int. 11. If upon your present examination you in any way add to or change the testimony then given by you, and particularly whether you have seen and read any letter in relation to the present condition of this case, and why a second examination has become necessary, and let such letter be made a part of your answer hereto.

222 Ans. to cross-int. 11. Know of no change of or addition to my former testimony. Have heard that Casper A. Werges puts up the defence that his wife had not written the signature purporting to be hers.

Cross-int. 12. If in answer to direct int. 4 you speak of any persons representing these defendants, or either of them, state fully and particularly how you know that he had any authority to represent them.

Ans. to cross-int. 12. The papers were received by mail.

Cross-int 13. If you answer direct int. No. 7 affirmatively, state all the knowledge you have in respect to the matter fully and particularly.

Ans. to cross-int. 13. I have fully answered the above interrogatory in my direct examination.

223 Cross-int. 14. There are two interrogatories each No. 8. State fully and particularly how you obtained a knowledge of the facts to which they relate; whether before or since your former examination, and whether you were present at the occurrence of any of the facts testified to by you; and if so, give the names of all other persons who were present, and the times and places. If you refer to letters or other writings as the sources of

your knowledge, let them be attached as a part of your answer hereto.

Ans. to cross-int. 14. The facts as testified in my answer to direct interrogatory No. 8, (first,) I have learned through my presence during the negotiations between Mr. Mersman and Krueger.

Cross-int. 15. If you answer the 9th direct interrogatory affirmatively, state how you obtained your knowledge; state at
224 what of the occurrences testified to you were present; if you have any writings in respect to the same, let them be attached to your answer hereto.

Ans. to cross-int. 15. My knowledge is obtained from the books of Orthwein & Mersman.

Cross-int. 16. If you answer direct int. No. 10 in the negative, state all of the knowledge you have in respect thereto, giving with fullness and particularly all the sources of your knowledge, and state whether anything has occured since your former examination which enables you to testify more fully than you than testified; and if so, what?

Ans. to cross-int. 16. My knowledge is obtained from the books of Orthwein & Mersman.

Cross-int. 17. If you say that you know anything as to the
225 manner in which the six thousand dollars was paid, state how you obtained your knowledge upon that subject, if from letters or other writings, produce them and let them be made a part of your answer hereto.

Ans. to cross int. 17. My knowledge is obtained from the books of Orthwein & Mersman.

Cross-int. 18. State at what place you are now being examined, and give the names of all persons who have been present at any portion of your examination, whether any one has acted as counsel for Mr. Mersman, and whether any of your answers have been changed at the suggestion of any person present, or whether in making your answers you have referred to any books or papers, and if so, what books or papers, and let them, if in the form of letters, be attached hereto, and if in any other form, let copies
226 of them be so attached.

Ans. to cross-int. 18. At the office of Philip Stock, notary public; nobody present except myself and notary, and none of my answers have been changed from the original form as given.

All correspondence and copies of books relating to this loan are either in your court or in the hands of the attorneys, I believe.

(Signed) CHAS. F. ORTHWEIN.

227 I, Philip Stock, a notary public within and for the city of St. Louis and State of Missouri, do hereby certify that Charles F. Orthwein, whose place of residence is the city of St. Louis and State of Missouri, was by me sworn to testify the whole truth of his knowledge touching the matter in controversy in the cause aforesaid; that deponent was examined and his examination reduced to

writing by Philip Stock, who is neither of the parties, attorney of neither, nor in any wise interested in the event of the suit, and after being carefully read over to the said deponent the same was sworn to and subscribed by the said deponent, in my presence, on the 5th day of September, A. D. 1879, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, at my
228 office, room 24, No. 506 Olive street, city of St. Louis and State of Missouri.

Given and certified under my hand and seal official, this 5th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

229 William D. Orthwein, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

Int. 1. What is your name, age, place of residence, and occupation?

Ans. to int. 1. Wm. D. Orthwein; thirty-eight years old; reside in the city of St. Louis, Mo., and am in the commission business.

Int. 2. State whether or not you are familiar with the handwriting of E. H. Kreuger, deceased; and if so, state what your opportunities have been for becoming familiar with the same, and examine the note in suit, and state what, in your opinion, the fact is as to whether or not what purports to be the signature of Lucy W. Werges is in his handwriting.

Ans. to int. 2. I know Kreuger's handwriting through
230 many years correspondence between the firms of Kreuger, Werges & Co. and Orthwein & Mersman. The signature of Mrs. Lucy W. Werges on the note is in German, while E. H. Kreuger in his correspondence with Orthwein & Mersman always wrote in English. It is certainly not Mr. Kreuger's handwriting, for there is not a shadow of resemblance between the two handwritings.

Int. 3. State when and where you first saw said note, and whether or not when you first saw it the name of Lucy W. Werges was subscribed thereto.

Ans. to int. 3. Saw note when it was received by Orthwein & Mersman for Mr. Mersman, in September, 1870; the name of Mrs. Lucy W. Werges was on the note then.

Int. 4. State where said note and mortgage, given to secure
231 the same, were first delivered to complainant, and if the same were first so delivered at the city of St. Louis; state whether or not the same were delivered there in person by the defendants, or either of them, or any person representing them, or were transmitted from Clayton, Iowa, to said city of St. Louis by mail, and if by mail, by whom the same were so transmitted.

Ans. to int. 4. The note and deed of trust were received through the mail in annexed envelope by Orthwein & Mersman and handed

to Mr. Mersman, and the envelope I herewith attach and make it a part of my deposition as Exhibit "A."

Int. 5. State what the fact is as to whether or not you at any time before filing the defendants' answer herein had any knowledge, notice, information, or intimation that what purports to be
232 the signature of Lucy W. Werges to said note was not her genuine signature, or that she had not executed said note jointly with her said husband, Casper A. Werges.

Ans. to int. 5. None whatever.

Int. 7. State whether or not any one, and if so, who, acted as agent of complainant in negotiating the loan for which said note and mortgage were given?

Ans. to int. 7. No one.

Int. 8. State what, if you know, the fact is with regard to said E. H. Krueger, deceased, having acted as agent of complainant in negotiating said loan or in the preparation, handling, endorsing, transmitting, or delivery of same to complainant, or to the firm of Orthwein & Mersman.

Ans. to int. 8. Mr. Krueger, being the managing business
233 partner of the firm of Krueger, Werges & Co., acted for their firm and Mrs. Lucy W. Werges in negotiating the loan from Mr. Mersman.

Int. 8. State all you know, if anything, as to where, when, under what circumstances, why and by whom (if not by her,) what purports to be the signature of Lucy W. Werges was subscribed to said note.

Ans. to int. 8. Know nothing about it.

Int. 9. State if you know whether or not complainant, or the firm of Orthwein & Mersman, or any one else for him, had paid or advanced the $6,000.00, the consideration of the said note and mortgage, or any part thereof, before the actual delivery of said note and mortgage at the said city of St. Louis

Ans. to int. 9. The $6,000.00 was placed into the hands of Orthwein and Mersman by Mr. Mersman to the credit of
234 Krueger, Werges & Co., to be paid to them as their business necessities required it; some money was paid them a few days before the papers were received, but it was done so by the urgent request of Messrs. Krueger, Werges & Co., as they needed the money in their business, and the positive assurance that the papers were all executed and in process of record, which would take a few days, after which they would come forward promptly, which they did.

Int. 10. State whether or not the $6,000.00, the consideration of the note and mortgage in suit, was paid by complainant through the firm of Orthwein & Mersman; and if you say it was, state whether or not the same, or any part thereof, was paid, or to be paid, to the defendant, Casper A. Werges, or to Krueger, Werges & Co., before the actual delivery to, and approval by, complainant at the
235 said city of St. Louis of said note and mortgage

Ans. to int. 10. I have fully answered this interrogatories in in terrogatory No. 9.

Int. 11. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause; if yea, set forth the same fully and at large in your answer?

Ans. to int. 11. I know that Mr. Krueger, in behalf of their firm, first came to St. Louis in August, 1870, to negotiate a loan from the firm of Orthwein & Mersman to continue their business. Messrs. Orthwein & Mersman advised him that, as most of their pro-
236 duct was being shipped East (New York), he had better try to get a loan there. Mr. Krueger at once went to New York, but failed to get the loan. He then returned to St. Louis, and negotiated the loan with Mr. Mersman. I further know that the loan was made for the purposes stated; that every dollar of it went into their business; that the interest was paid on it every year until the death of E. H. Krueger; that Mr. Casper A. Werges knows all those facts, for he conversed with me about them, and that never any protest was made by Mr. Casper A. Werges, or any one else, that Mrs. Lucy W. Werges had not signed the note.

237 *Cross-Examination.*

Cross-int. 1. How long have you resided in the city of St. Louis; in what business have you been engaged, and if you have had partners, give their name?

Ans. to cross-int. 1. I have been a resident of the city of St. Louis for about 17 years, and have been engaged in the commission business with the firms of Haenschen & Orthwein and Orthwein & Mersman.

Cross-int. 2. Are you acquainted with Joseph J. Mersman; were you at any time connected with him in business; and, if so, when and during what time, and in what business; and are you in any way related to him?

Ans. to cross-int. 2. I am acquainted with Joseph J. Mersman, and am connected with him in business since 1870, but he is
238 no relation of mine.

Cross-int. 3. Are you acquainted with Lucy W. Werges; if so, when and where did you first see her?

Ans. to cross-int. 3. I saw Mrs. Lucy W. Werges on their farm in the early part of 1875.

Cross-int. 4. If, in answer to ints. 2 and 3 in your direct examination, you say you have seen the note and mortgage there referred to, state in whose hands the same were when you first saw them, or either of them; and if you know, state whether the same were sent by mail from Iowa to St. Louis; and if they were so sent, how you know that fact?

Ans. to int. 4. I saw the note and mortgage when they were received by Orthwein and Mersman; they came by mail, and the en-

velope which contained the same I have already attached to
239 my deposition as exhibit marked "A."

Cross-int. 5. If, in answer to int. 4 upon your direct examination, you say said note and mortgage were received at St. Louis by mail, state how they were enclosed, when so received, how you know that fact, whether anything else was contained in the same enclosure, and whether the package was delivered to Mr. Mersman; and if the enclosed papers were read to him, state by whom, produce the accompanying letter, and let it be made a part of your answer hereto.

Ans. to cross-int. 5. I have fully stated how they were received, but don't know whether the package contained anything else; the papers were read to Mr. Mersman in the office, but by whom I do not now recollect.

Cross-int. 6. If you have control of the books of either of
240 the firms referred to by Mr. Mersman in his examination, or access to them, examine all entries which they contain in respect to the moneys secured by said note and mortgage, state in what books they are to be found, at what pages, and let an exact copy with the dates as they there appear be attached to and made a part of your answer hereto.

Ans. to cross-int. 6. Statements of accounts from the books of Orthwein & Mersman have been fully made out, and to the best of my belief are now either in court or in the hands of the attorneys.

Cross-int. 7. Did you ever have any correspondence with E. H. Krueger or with the firm of Krueger & Werges in respect to the said note and mortgage, or the moneys loaned thereupon or secured thereby, and if so, produce all letters received by you and
241 copies of all letters written by you and let the same be made parts of your answer hereto?

Ans. to cross-int. 7. All correspondence between E. H. Krueger, Kreuger, Werges & Co., and Orthwein & Mersman, and Joseph J. Mersman, having any bearing in this case are already in court or in the hands of the attorneys, to the best of my knowledge.

Cross-int. 8. Were you present at the examination of Mr. Mersman herein?

Ans. to cross-int. 8. I have not been present.

Cross-int. 9. Were you formerly examined as a witness in this action; when and where, at whose office, and give the names of all the persons present at such examination?

Ans. to cross-int. 9. I was formerly examined as a witness
242 in this action at this city, in the office of L. L. Walbridge, a notary public, but when and who was present I am unable to state.

Cross-int. 10. If you say that you have been previously examined, state whether upon such examination you did or did not testify fully to all of the facts of which you then had any knowledge as to the said note and mortgage, and the purpose for which and the circumstances under which they were executed.

Ans. to cross-int. 10. I did, to the best of my knowledge and memory.

Cross-int. 11. If upon your present examination you in any way add to or change the testimony then given by you and particularly whether you have seen and read, or heard read, in relation
243 to the present condition of this case, and why a second examination has become necessary, and let such letter be made a part of your answer hereto.

Ans. to cross-int. 11. I do not know of any change regarding my previous testimony. The only thing heard of the case was by letter of Messrs. Wright, Gatch & Wright to Mr. Mersman, wherein they say that more testimony had to be taken on account of defence claiming that the signature of Mrs. Lucy W. Werges on the note was not genuine. This letter, however, is not in my possession, and therefore cannot make it a part of my deposition.

Cross-int. 12. If, in answer to direct int. 4, you speak of any persons representing these defendants, or either of them, state
244 fully and particularly how you know that he had any authority to represent them.

Ans. to cross-int 12. They were not received by any person, but by mail.

Cross-int. 13. If you answer direct int. No. 7 affirmatively, state all the knowledge you have in respect to the matter fully and particularly.

Ans. to cross-int. 13. I have fully answered direct int. No. 7.

Cross-int. 14. There are two interrogatories, each No. 8. State fully and particularly how you obtained a knowledge of the facts to which they relate, whether before or since your former examination, and whether you were present at the occurrence of any of the facts testified to by you; and, if so, give the names of all other persons who were present, and the times and places; if you
245 refer to letters or other writings as the sources of your knowledge, let them be attached as a part of your answer hereto.

Ans. to cross-int. 14. As answered heretofore, I derived my knowledge from the facts that Mr. Krueger was the managing partner of the firm of Krueger, Werges & Co., attending to all of the correspondence and negotiations regarding the business of Krueger, Werges & Co.

Cross-int. 15. If you answer the 9th interrogatory affirmatively, state how you obtained your knowledge, state at what of the occurrences testified to you were present; if you have any writings in respect to the same, let them be attached to your answer hereto.

Ans. to cross-int. 15. I have obtained my knowledge by
246 referring to the books of Orthwein & Mersman.

Cross-int. 16. If you answer direct int. No. 10 in the negative, state all of the knowledge you have in respect thereto, giving with fullness and particularity all the service of your knowledge, and state whether anything has occurred since your former exam-

ination which enables you to testify more fully than you then testified; and if so, what?

Ans. to cross-int. 16. My knowledge was obtained by reference to the books of Messrs. Orthwein & Mersman.

Cross-int. 17. If you say that you know anything as to the manner in which the six thousand dollars was paid, state how you obtained your knowledge upon that subject; if from letters or other writings, produce them and let them be made a part of your answer hereto.

247 Ans. to cross int. 17. By reference to the books of Orthwein & Mersman.

Cross-int. 18. State at what place you are now being examined, and give the names of all persons who have been present at any portion of your examination, whether any one of them has acted as counsel for Mr. Mersman, and whether any of your answers have been changed at the suggestion of any person present, or whether, in making your answers, you have referred to any books or papers, and, if so, what books or papers, and let them, if in the form of letters, be attached hereto, and if in any other form let copies of them be so attached.

Ans. to cross-int. 18. At the office of Philip Stock, notary public; nobody present, except the notary and myself, and none of
248 my answers have been changed; as already stated before, all correspondence and copies of books relating to this case are either in your court or in the hands of the attorneys, to the best of my recollection.

(Signed) WM. D. ORTHWEIN.

249 I, Philip Stock, a notary public within and for the city of St. Louis, and State of Missouri, do hereby certify that William D. Orthwein, whose place of residence is the city of St. Louis, and State of Missouri, was by me sworn to testify the whole truth, of his knowledge, touching the matter in controversy in the cause aforesaid; that deponent was examined, and his examination reduced to writing by Philip Stock, who is neither of the parties, attorney of neither, nor in any wise interested in the event of the suit, and, after being by me carefully read over to the said deponent, the same was sworn to and subscribed by the said deponent in my presence, on the 9th day of September, A. D. 1879, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, at my office, room 24, No. 506 Olive street, city of St. Louis
250 and State of Missouri.

Given and certified under my hand and seal official, this 9th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

THE STATE OF MISSOURI, } *ss:*
City of Saint Louis, }

I, Philip Stock, a notary public within and for the city of St.

Louis and State of Missouri, or duly commissioned for that purpose, do certify that in pursuance of the annexed commission and notices, came before me at my office, room 24, No. 506 Olive street, city of St. Louis and State of Missouri, Joseph J. Mersman, Charles F. Orthwein, and William D. Orthwein, who were by me sworn and examined, and such examination reduced to
251 writing by Philip Stock, who is neither one of the parties, their attorney, nor in anywise interested in the event of the suit, and after being by me read over to each of said deponents, the same was sworn to and subscribed by said witnesses respectively in my presence, and their said depositions are now herewith returned.

Given under my hand and seal official, hereto affixed, at office in the city of St. Louis, State of Missouri, this 11th day of September, A. D. 1879.

[SEAL.] (Signed) PHILIP STOCK,
Notary Public.

252 THE STATE OF MISSOURI, }
City of Saint Louis, } *ss:*

It is hereby certified that Philip Stock, on the 29th day of August and the 5th, 9th, and 11th days of September, A. D. 1879, was and now is a notary public within and for the city of St. Louis and State of Missouri, duly commissioned and acting as such, and that full faith and credit are due to his acts as such.

In testimony whereof, I, Charles F. Vogel, clerk of the circuit court, city of St. Louis and State of Missouri, have hereunto subscribed my name and affixed the seal of said court at office this 12th day of September, eighteen hundred and seventy-nine.

[SEAL.] (Signed) CHARLES F. VOGEL, *Clerk.*

Fee of notary, $28.65, paid by Jos. J. Mersman.

253 EXHIBIT "A."—PHILIP STOCK, *Notary Public.*

Mortgage of Verges to Kruger & Jos. J. Mersman.
Stamp: McGregor, Ioa., Sept. 13.
Three 3-cent stamps.
Address: Messrs. Orthwein & Mersman, St. Louis, Mo.

254 [Endorsed:] In the U. S. circuit court, district of Iowa. Joseph J. Mersman *vs.* Casper A. Werges and Lucy W. Werges. Depositions of Joseph J. Mersman, Charles F. Orthwein, and Willian D. Orthwein. Opened and filed Sept. 27, 1879. Ed. R. Mason, c'k. Fee, $28.65, paid by Joseph J. Mersman.

255 And the respondents, to sustain the issue on their part, introduced the following evidence, to wit:

256 $6,000. MCGREGOR, *Sept.* 1, 1870.

One year from date, for value received, I promise to pay

E. H. Kruger, or order, six thousand dollars, with ten per cent. interest.

(Signed) CASPER A. WERGES.
(Signed) L. W. WERGES.

[Endorsed on back of note.]

Received March 1st, 1871, three hundred dollars, being interest for past 6 months.

Rec'd Sept. 1st, 1871, ints., three hundred dollars, to date.

March 1st, 1872, interest			$300 00
Sept'r 1st, 1872,	"		300 00
March 1st, 1873,	"	to date	300 00
Sept'r 1st, 1873,	"	"	300 00
March 1st, 1874,	"	"	300 00
Sept'r 1st, 1874,	"	"	300 00

E. H. Kreuger to Joseph J. Mersman.

257 Exhibit "A." W. E. Odell, notary public.
Exhibit "B." Philip Stock, notary public.

258 Depositions of witnesses produced, sworn, and examined in pursuance of the consent of the parties, at Wm. E. Odell's office, in McGregor, in the county of Clayton, and State of Iowa, before me, Wm. E. Odell, a notary public in a certain action now pending in the circuit court of the United States in and for the district of Iowa, wherein J. J. Mersman is complainant, and Casper A. Wergus and L. W. Wergus are respondents, on behalf the repondents.

Casper A. Wergus, of lawful age, being produced, sworn, and examined on the part of the respondents, deposed as follows:

1 Question. Are you one of the respondents in this action?
Answer. Yes.

259 2 Q. Have you before given testimony in that case?
A. Yes, sir.

3 Q. At the time you so testified, had you ever seen the note mentioned in this suit since the day you signed your name to it?
A. No, sir.

(Note offered in evidence by respondents, which is hereto attached, marked Exhibit "A." Note shown to witness.)

4 Q. State whether that is your signature to that note.
A. Yes, sir.

5 Q. Now, you may tell what note that is.
A. That is a note I give to Kruger with a mortgage.

260 6 Q. Who wrote the note and mortgage accompanying it, and when did you sign them?
A. Mr. Hatch wrote the note and mortgage, and I signed them here in his office.

7 Q. After they were signed, what was done with them?

A. I don't know; after they were signed, went on the porch. After I came from the porch, Mr. Hatch handed them to me in an envelope. I took them home. The next morning, right after breakfast, I went to Clayton, and handed the note and mortgage to E. H. Kruger.

8 Q. You may state whether the envelope was open from the time you left Mr. Hatch's office till you delivered it to Mr. Kruger?

261 A. No, sir; I never opened it.

9 Q. After you reached home, and up to the time of your starting for Clayton next morning, where were the note and mortgage?

A. They were in a draw in a table in a back room in my house.

10 Q. Who had access to that drawer?

A. Nobody but me.

11 Q. When you delivered that note and mortgage to Mr. Kreuger, state, if you know, whether it had been filed for record in the recorder's office.

A. I don't know anything about it.

11 Q. State whether you had done anything to have filed for record.

A. No, sir.

262 13 Q. State whether or not the note and mortgage had been in anybody else's possession, after you took them from Mr. Hatch's office, until you delivered them to Mr. Kreuger, at Clayton.

A. No, sir.

14 Q. About what time in the day was it that you delivered the note and mortgage to Mr. E. H. Kreuger at Clayton?

A. Between eight and nine o'clock in the forenoon.

15 Q. Do you know your wife's handwriting?

A. Yes, sir.

16 Q. Is that her signature to the note—Exhibit A?

A. It is not her handwriting.

263 It is understood that objections to the questions and answers may be made any time hereafter, except objections to the form of questions.

17 Q. Had you ever any knowledge of a request being made that your wife should signs aid note—Exhibit "A"?

A. No, sir.

18 Q. Have you any knowledge of her authorizing any person to sign her name to said note?

A. No; I have not.

19 Q. At what place in Clayton did you deliver said note and mortgage to E. H. Kreuger?

A. In the Clayton Mills, in his office.

20 Q. How far is that from Elkader, the county seat?

A. About fifteen or sixteen miles.

264 21 Q. How far did you live from the county seat at that time?

A. About eleven miles.

22 Q. How far away did you live from the road commonly traveled between McGregor and Clayton?

A. Not quite three-quarters of a mile.

23 Q. When was the first information you received that your wife's name was claimed to be signed to said note?

A. At the time I gave the chattel mortgage Mr. Orthwein told me my wife's name was to the note; that was a short time before I was sued.

On cross-examination the witness testified as follows:

1 Q. What Mr. Orthwein was it told you?

A. Wm. D. Orthwein.

265 2 Q. Was it not in the month of February?

A. I don't know exactly; I believe it was in February; can't say certain.

3 Q. Was the note written and signed by you the same day and place the mortgage was signed?

A. Yes.

4 Q. Did you then know that Mrs. Werges had not signed the note?

A. No, sir.

5 Q. Was she present on that occasion?

A. Yes.

6. You did not see her sign the note at that time, did you?

A. No.

266 7 Q. Do you know of her objecting to sign this note at that time?

A. No, sir.

8 Q. So far as you know the mortgage might or might not have been recorded when you handed it to Kruger?

A. I know it was not recorded when I handed it to Kruger.

9 Q. How do you know now that you took the mortgage to Kruger the next morning after it was drawn up?

A. I know particular, because I took it over myself.

10 Q. Was Kruger at McGregor with you at the time the mortgage was drawn up?

A. No, sir.

267 11 Q. Was anything said at McGregor about Mrs. Werges signing or not signing the note?

A. Not as I know of.

(Signed) CASPER A. WERGES.

Sworn to before me, and subscribed in my presence, by the said Casper A. Werges, this 16th day of October, 1879.

[SEAL.] (Signed) WM. E. ODELL,
Notary Public.

268 L. W. Werges, of lawful age, being produced, sworn, and examined on the part of respondent, deposed as follows:

1 Q. Are you the wife of Casper A. Werges, and one of the respondents?

A. Yes, sir.

2 Q. Were you with your husband in McGregor on the 1st day of September, 1870, in Mr. Hatch's office?

A. Yes, sir.

3 Q. Did you sign any paper that day there in the office; if so, state what it was?

A. Yes, sir; I signed a paper; I signed the mortgage.

Note, Exhibit "A," shown witness.

269 4 Q. Have you ever seen that paper before to-day?

A. No, sir.

5 Q. Is that name L. W. Werges, your writing?

A. No, sir.

6 Q. Did you ever authorize any person to sign your name to that note?

A. No, sir.

7 Q. When did you first know that your name was claimed to be signed to that note?

A. I don't remember when it was; anything about it.

8 Q. Can you state whether it was since or before the death of E. H. Kruger?

A. I think it was before; I don't know exactly; I can't remember.

270 9 Q. Can you remember where you were when you first heard that your name was on that note?

Objected to, on the ground that witness already said she did not know anything about it.

A. I was in the house.

10 Q. In what house?

A. In my own house.

11 Q. Who first told you that your name was on that note?

Objected as above, and on the further ground that there is no evidence that any one has told her.

A. Mr. Werges.

12 Q. Have you any means of fixing the time when that was?

Same objection as above.

A. It was in August.

271 13 Q. Have you any means of fixing the time when Mr. Werges told you that your name was on that note?

A. I told Mr. Werges that I did not sign the note.

14 Q. Can you tell when that talk was?

A. I cannot; I did not pay any attention to it at all.

15 Q. Did you ever at any time give your consent to your name being on that note?

A. No, sir; I did not put it there.

16 Q. Did you ever consent for any other person to put it there?

A. No, sir.

17 Q. Have you any knowledge how your name came on that note?

A. No, sir.

(Signed) L. W. WERGES.

(L. W. Werges—translation.)

272 Sworn to before me, and subscribed in my presence, by the said L. W. Werges, this 16th day of October, 1879.

[SEAL.] (Signed) WM. E. ODELL,
Notary Public.

273 STATE OF IOWA, } *ss:*
Clayton County, }

I, Wm. E. Odell, a notary public in and for said county, do hereby certify that in pursuance of the consent of the parties I caused to come before me at my office, in McGregor, on the 16th day of October, 1879, between the hours of 9 o'clock in the forenoon and 1 o'clock in the afternoon, Casper A. Werges and L. W. Werges, who were then and there by me duly sworn and examined, and their examinations reduced to writing, and after being by me read over to said witnesses the same were subscribed and sworn to by them respectively in my presence, and their said depositions are now herewith returned.

And I further certify that Thos. Updegraff was present and conducted the cross-examinations on behalf of the complainants,
274 and J. A. Crosby and L. A. Hatch were present and conducted the examination on behalf of the respondents.

Given under my hand and official seal, hereto annexed, at McGregor, in the county of Clayton, State of Iowa, this 16th day of October, 1879.

[SEAL.] (Signed) WM. E. ODELL,
Notary Public.

Opened and filed October 18, 1879.

ED. R. MASON, *C'k.*

[Endorsed:] Jos. J. Mersman *vs.* Casper A. Werges *et al.* Depositions of Casper A. Werges and Lucy W. Werges. Opened and filed Oct. 18, 1879. Ed. R. Mason, c'k.

275 And the following evidence in the case of John C. Nulson *et al. vs.* William Krueger *et al.*, is by stipulation of parties to be used in this cause, which said stipulation and evidence is in the words and figures following, to wit:

276 In the United States Circuit Court, District of Iowa.

JOSEPH J. MERSMAN *vs.* CASPER A. WERGES and LUCY W. WERGES.

It is hereby agreed that this cause was heard upon the deposi-

tions, documentary and other evidence originally filed herein, and so much of the evidence originally filed in the case of John C. Nulson, trustee, &c., *vs.* William H. Kruger "*et al.*" pending in this court, as is shown by the copy of portions thereof this day furnished to the clerk by complainant's counsel, and the memoranda also this day furnished to the clerk by defendants' counsel, which latter portion is to be transcribed by the clerk; and when so tran-
277 scribed to be with said copy furnished by complainant's counsel, filed in this cause as a part of the record thereof, with the objections made by the parties to the competency of the evidence so offered.

Oct. 13th, 1880.

(Signed) WRIGHT, GATCH & WRIGHT,
Sol'rs for Complainant.

(Signed) PARSONS & RUNNELLS,
Sol'rs for Def'ts.

[Endorsed:] No. 707. Eq. Jos. J. Mersman *vs.* Casper A. Werges. Stipulation. Filed Oct. 16, 1880. E. R. Mason, clerk.

278 In the United States Circuit Court, District of Iowa.

JOSEPH J. MERSMAN, Complainant,
vs.
CASPER A. WERGES and LUCY W. WERGES, Defendants.

Evidence taken in the case of "J. C. Nulson *et al.*" *vs.* Wm. Kruger *et al.*, and which the parties have stipulated may, as far as material, be used in this case.

Deposition of Complainant, Joseph J. Mersman.

Q. 2. State whether or not you had an interview with said E. H. Kruger, at St. Louis, about the month of August, 1870, relative to the firm of Orthwein & Mersman, regarding the advances of money to the firm of Kruger, Werges & Co., and what understonding, if any, there then was between you that he should procure se-
279 curity on the farm of Casper A. Werges for any such advances; state fully all the conversation that occurred between you.

A. About the middle of August, 1870, Mr. E. H. Kruger came to St Louis, where he had ineffectually endeavored to secure advances for the purpose of running their mill at Clayton; I never had met him before this time; he had done business with the firm of Hanschen & Orthwein, the predecessors of Orthwein & Mersman; he was, on his arrival in St. Louis, introduced to me; he had several meetings with me during two or three successive days, urging me at these meetings to make an advance to the firm of Kruger, Werges & Co.; at the conclusion of these meetings I finally agreed to advance the firm of Kruger, Werges & Co. the sum of
280 $6,000 (of six thousand dollars,) on the following conditions: First. That I was to receive as security a mortgage deed

of trust on the farm of Casper A. Werges, represented to me by Kruger as being worth twelve thousand dollars, so much cash having been offered to him for it. That besides the interest of ten per cent. for all money advanced, the firm of Orthwein & Mersman was to receive a commission of 2½ per cent. for running the business, that is, selling the products of the mill and keeping a perfect account of the mill, with the purchasers, of its products here and in New Orleans, and New York and Boston.

The commission of 2½ per cent. was only to be on the net amount, after deducting freight and commission paid in New York
281 and New Orleans, from the price obtained for whatever was sold in St. Louis. Only one commission was charged, nor was more than one commission charged by Orthwein & Mersman in any case. The mill was to receive return interest at the rate of ten per centum per annum, on all sums received for the return of the products, from the day the sums were credited to us up to the day of the next settlement and balancing books. The claim of the demised firm of firm of Haenschen & Orthwein was to be paid first; that as soon as the mill had made the money, and I had [a] verbal agreement with Hanschen & Orthwein that they would wait with their claim until Werges, Kruger & Co.'s mill had made and earned more money in their business, and that Kruger and Co. were not
282 to be troubled or attached in any manner for the payment of this sum until they had made the money in this manner.

Q. 4. State what the fact is as to whether or not it was suggested to E. H. Kruger, in the interview referred to in the last interrogatory, either by yourself or any one else, in your hearing, that Mr. Werges might be more willing to execute the papers to E. H. Kruger than to a stranger, and that after their execution he, Kruger, could transfer them.

A. I am confident there was no such suggestion made, either by myself or my partner, Mr. Orthwein. No one else would be permitted to make any such suggestions as indicated in the fourth interrogatory; Wm. D. Orthwein was not a member of said
283 firm. E. H. Kruger's supplications for the advance were addressed exclusively to me, and I certainly made no such remark to him, as I would gladly have avoided the risk of making this advance.

I even made him promise that he would explain and state the case fully to his partner, Mr. Werges, as to the risk he, Werges, would make himself personally liable. Of the three partners in the transaction, I should have been the party most highly pleased had it not consummated.

Q. 8. Whom, if any one, did Mr. Kruger represent in the transaction?

A. I think that Mr. Kruger represented the mill firm himself, and Mr. Werges and Wm. Kruger.

284 Q. 9. State what representation, if any, said E. H. Kruger was authorized by you to make to Mr. Werges, in any way

qualifying or modifying his absolute liability therein, or as to where or how the same should be paid.

A. Mr. Kruger had authority from me to state to Mr. Werges that I would make a loan to him of $6,000 on his farm of 290 acres for one year, interest at the rate of ten per cent. per annum, payable semi-annually, provided that an abstract of title be furnished with the mortgage; that this instrument, and note for the money, should be drawn up by a good lawyer, and that his certificate to the effect that the land was clear and unincumbered, title perfect, should be furnished and delivered to me before I paid the money.

285 There was nothing said as to the manner of paying back my money. I am confident Mr. Werges is sufficiently intelligent to know that he had the right to do so at any time from and after maturity of his note.

Q. 10. State whether or not E. H. Kruger was authorized to act as the agent of said Mersman for any purpose whatever connected with said transaction.

A. As stated in my reply above, Mr. Kruger was authorized to state to his partner, Mr. Werges, on what conditions I would make the loan.

286 *Cross-examination.*

Q. 10. Now state, if you please, all of the contract or arrangement which you made with him in relation to the loan of $6.000.

A. Well, there was no contract made between me and Mr. Kruger, only conditionally, that if Mr. Werges would secure the $6,000, which we all understood to be only a margin for the further business.

Q. 11. I don't ask for any understanding, simply call for the facts.

A. I am coming to that.

JUDGE. Remember, the gentlemen wants to know what your conversation was, in order to get at the contract from your conversations, but he objects to your conclusions.

287 Q. 12. The purposes or objects which you or anybody else had in view?

A. Well, during the first three days there was an immense amount of talking—begging on the part of Mr. Kruger that I should make——

Q. 13. That is not responsive.

A. Very well; that I would make the loan, and the main conditions were that the business should go on as it had been done heretofore. The loan which I agreed to make to Mr. Werges of $6,000 was to bear ten per cent. interest, and on the strength of this loan, so far as I remember, the firm afterwards, in consideration,——

Q. 14. That is beyond the question.

A. No, it is not; I think not.

Q. 15. In relation to the loan, I asked the full terms, and
288 every thing, so far as simply relates to the loan.

A. Yes; but they are so intermingled. I would like to accommodate you, but I don't see how I am to separate them, but I think in a thing of this kind you had better make a variety of questions and unravel them more. The picture is not so complete in my brain. I can't tell you one thing without saying something else, perhaps, that this case dont want.

Q. 16. Let me suggest, Mr. Mersman, that this $6,000, as I understand it, was an individual matter with you, and I now ask only with relation to the matter so far as it was individual. I wanted to get through with that before going on to that which was the firms.

289 A. It was an individual thing; but at the same time I, the loaner, was a member of that firm, and I, as an individual, would not have made Mr. Werges that loan without——

Q. 17. That is not testimony.

A. Well, is there anything to be struck out there, or shall I endeavor to continue? Is that last part irrelevant?

Q. 18. So far as anything relates to the terms of the $6,000 loan, which you yourself individually made, it was that I wanted, and wanted all of it.

A. And also about the contract that was made at that time?

Q. 19. You already have that, sir—the contract of $6,000—which you, as an individual, made, and your testimony is all written down, you know, in regard to the firm's arrangement, and all
290 that I shall cross-examine you, but wish to begin first with your individual part of it.

A. Well, the question is, understand, what contract took place between me and Mr. Kruger at that time?

Q. 20. Yes.

A. Well, really, there was no contract whatever took place. I stated the conditions upon which I would make the loan to Mr. Kruger, and if that was made, the business was to be carried on; and if it was not made, the firm of Orthwein & Mersman would not advance the firm of Kruger, Werges & Co. any more money. That is really, then, the whole thing in a nutshell.

Q. 21. Had Orthwein & Mersman before that time done
291 any business with Kruger & Werges or the firm of Kruger, Werges & Co.?

A. None whatever, to my knowledge—not a cent.

Q. 22. This $6,000 was your own means, and not the means of the firm of Orthwein & Mersman, was it not?

A. My own private money; yes, sir.

Q. 23. You afterwards received a mortgage from Mr. Kruger, did you not, executed by Mr. Werges?

A. Yes, sir.

Q. 24. And a note for $6,000?

A. Yes, sir.

Q. 25. Did you make any contract in relation to the note different from the terms expressed in them?

A. With whom?

Q. 26. With anybody.

A. No, sir; with no one.

292 Q. 27. To vary the terms of the contract?

A. No, sir.

Q. 28. You never, at any time?

A. I have not, sir.

Q. 29. Then you have stated all of the contract, have you, in regard to the individual loan by you of the $6,000?

A. Yes, sir.

Q. 30. To whom did you pay the money?

A. I paid the money in a check drawn by my former partner in the name of Nulson & Mersman, to the order of Orthwein & Mersman, and consequently the money was paid to the firm of Orthwein & Mersman.

Q. 31. Do you remember at what date the check was delivered to them?

A. Well, I really could not say; it is in my mind that it
293 was the next day after this mortgage and note from Mr. Werges arrived. The money had been collected shortly before, and was in the——

Q. 32. It was E. H. Kruger who sent you that note and mortgage, was it not?

A. Yes, sir. Well, that I can't say, either; I think the letter was signed by Kruger, Werges & Co.; I requested Mr. Kruger to have the note made payable to Mr. Kruger, so as to show, you know, that Mr. Kruger had something to do with that money.

Q. 38. The endorsement of Mr. Kruger was upon the note, was it not?

A. The one received by me?

Q. Yes.

A. Yes, sir, I think so; I was so told.

* * * * * *

294 *Deposition of Chas. F. Orthwein. Direct Ex.*

Q. 16. State whether or not, about the month of August, 1870, E. H. Kruger was at the office of Orthwein & Mersman, in St. Louis; and, if so, at whose request, if you know, and whether or not he then executed, in the name of Kruger, Werges & Co., any contract to or with said Orthwein & Mersman with respect of money to be advanced by said last-named firm to Kruger, Werges & Co., or relative to dealings between said firms; if so, what were the terms and conditions of such contract; state fully all that was said or done relative to the matters herein inquired about?

A. E. H. Kruger was at the office of Orthwein and Mersman in August, 1870; he was there, I suppose, at the request of Kruger, Werges & Co., soliciting additional aid; he came there under

295 the following circumstances: When the firm of Orthwein and Mersman was formed they advised Kruger, Werges & Co. that they declined to carry their business. E. H. Kruger thereupon came down to St. Louis, and begged them they should continue the business. Orthwein & Mersman again peremptorily refused to do so, advising Mr. Kruger to try to procure advances for the business of Kruger, Werges & Co., in the Eastern States. E. H. Kruger then went east, and returned in a short time—not more than eight days, as I now recollect, and stated that he was wholly unsuccessful in procuring advances East, and unless we could consent to help them, they would be compelled to go under. The firm of Orthwein and Mersman then agreed that if the firm of Kruger, Werges & Co. would procure and put into their business and
296 additional capital of $6,000, to be used as margin for contingent losses, that then they, the firm of Orthwein & Mersman, would carry the business of Kruger, Werges & Co. on the same terms as the firm of Hanschen & Orthwein had done. Those terms were that we should furnish all the money "need[ed]" for the purchase of grain at the mill, and to carry on the business, which required, at times, an advance of $60,000, for which we should have interest at the rate of ten per cent. per annum on advances made, being the same rate which we were paying to the bankers here, and receive a commissien of 2½ per cent. on all products shipped from the mill for account or under our control.

Q. 23. State, as fully as you can, the facts connected with the greatness of the indebtedness for which Casper A. Werges
297 executed the note and mortgage for $6,000, or held by J. J. Mersman, were first given, including what was said and done by E. H. Kruger.

A. Under what circumstances Kruger, Werges & Co. asked for the loan is stated in my answer to interrogatory 16. Mr. Mersman, on Kruger's ardent appeals at that time, finally agreed to loan them $6,000, provided they give good security. E. H. Kruger thought that Werges would secure such loan by deed of trust on his farm, and after he got home he wrote that Mr. Werges would execute a deed. The papers were made out according to Mr. Mersman paid the $6,000 over to our firm for account of Kruger, Werges & Co., and the latter made a draft on us for the money, or had it remitted to them by express.

Q. 34. Whom, if any one, did E. H. Kruger represent in
298 that transaction?

A. He represented the interest of Kruger, Werges & Co.

Q. 35. State what representation, if any, said E. H. Kruger was authorized by you to make to Mr. Werges in any way qualifying or modifying his absolute liability therein, or as to when or how the same should be paid.

A. None whatever. I had no interest in the money secured by deed of trust on the Werges farm, and haven't authorized Mr.

Kruger to make any representations of any kind to anybody in regard to it.

Q. 36. State whether or not the said E. H. Kruger was authorized to act as the agent of the said Mersman for any purpose whatever connected with the said transaction.

A. Kruger acted as agent in the interest of his firm, and
299 attended to the execution of the papers, as requested by Mr. Mersman, as he always attended to that kind of business for the firm.

* * * * * * * *

John P. Meyelis. Direct Examination.

Question 1. What is your name, age, place of residence, and occupation?

Answer. My name age is John P. Meyelis; my age 44; I reside in St. Louis, and my occupation is that of flour commission merchant.

Q. 2. If you are or have been a commission merchant, state how long, where, and the extent to which you have been engaged in that business.

A. I have been in the flour commission business since 1852 extensively.

300 Q. 3. State what you know, if anything, of any custom prevailing among commission merchants generally throughout the country, or *or* among commission merchants in the city of St. Louis during the years from 1868 to 1875, with respect to the allowance of commissions to commission merchants, through or by whose direction or under whose supervision sales of flour or other mill merchandise were made by third parties; also commission merchants, and charging commission thereon; and if you say you have knowledge of such custom on that subject, state particularly what it was, and during the period named what were the customary commission on the sales of such merchandise so made, and were the same reasonable?

301 A. It has always been the custom among commission merchants, sanctioned by the rules of the Merchants' Exchange, that whenever cash advances have been made in consignments to sell the property at best price obtainable, or send it to other markets, if a better price could be obtained or quicker sales made there; I have always charged a full commission on the net proceeds of such shipments sold in other markets, have done it for years, and do it now for some of the wealthiest and largest millers in Illinois, by assuming the full risk of failure of the merchants to whom such produce is reconsigned, attending to all correspondence, shipping, and negotiations of drafts; the commission merchant here is certainly entitled to the full usual commission.

(Signed) JOHN P. MEYER.

* * * * * * *

302 *Matthias Backer. Direct Examination.*

Question 1. What is your name, age, place of residence, and occupation?

Answer. My name is Matthias Backer; age, 59; occupation, flour commission business.

Q 2. If you are or have been a commission merchant, state when, how long, where, and the extent to which you have been engaged in that business.

A. Have been in the business in St. Louis since 1851 extensively.

Q. 3. State what you know, if anything, of any custom prevailing among commission merchants generally throughout the country, or among commission merchants in the city of St. Louis during
303 the years from 1868 to 1875 with respect to the allowance of commissions to commission merchants, through or by whose direction, or under whose supervision sales of flour or other mill merchandise were made by third parties, also commission merchants, and charging commissions thereon; and if you say you have knowledge of any such custom on that subject, state particularly what it was and during the period named what were the customary commissions of such merchandise so made, and were the same reasonable?

A. The firms I have been connected with have always made advances, more or less, to the mills whose products they had been handling; on flour advanced upon we always claimed and received our commission whether sold by us or not; when a miller is
304 depending and furnished by us with the entire capital to run his business, we always claimed and claim and have control of the entire product of the mill, disposing of the same in whatever manner we considered most advantageous, whether the flour was sold by us in our own market or shipped to other markets and third parties, we always claimed and received our commission on same; this, I think, is the custom all over the country, and I have never heard it questioned; the object of making advances is to secure business, and unless this can be done a commission merchant would naturally not put out money, for he is not a money lender; don't think anybody could obtain advances under any other conditions, at least not from a legitimate commission house.

(Signed) MATTHIAS BACKER.

* * * * * * * *

305 *Casper A. Werges. Direct Examination.*

28. I executed a note and mortgage on the farm where I reside to E. H. Kruger.

29. As far as I know said note was not signed by any one besides myself.

30. Signed the note and mortgage in Mr. Hatch's office.

31 Q. State all of the circumstances—how and for what purpose said note and mortgage were executed by you?

A. E. H. Kruger came to my farm and told me he had just arrived from St. Louis, and they had a new man in the company; the man he was not acquainted with before; his name was
306 Mersman; they would not furnish any more money for us without getting a mortgage upon my farm; he wanted me to give him a mortgage, then I told him I would not do it; then he said we cannot run the mill any more; I told him, I could not help it, I had enough money put in there; then he said I had nothing to do with the man in St. Louis—just give him the mortgage, and would have nothing to do with it afterwards, so I gave it to him.

32 Q. State what representation, if any, were made to you that induced you to execute the note and mortgage, and by whom such representations, if any, were made?

A. E. H. Kruger said he would send flour for it to pay the mortgage with; as soon as the flour was there, the mortgage was
307 paid; this is all I remember about it; about a year afterwards I asked him about it, and he said the mortgage was paid.

38. I then thought Mr. Kruger was an honorable man; he was my partner.

39. He said there was a pretty good prospect for milling business; that he could pay the mortgage easy, and I should never have any trouble with it.

* * * * * * * *

Lucy W. Werges. Direct Examination.

308 3. I signed a mortgage to E. H. Kruger on the homestead farm where I live.

4. Before I signed the same, had a conversation with E. H. Kruger; he called me in the room and asked me if I would not sign the mortgage, and I told him no; that I didn't like to do it because I hated the business always; then he told me he did not want us to put away more money in the mill; he just only wanted for me to sign the mortgage, and the mortgage was to be kept in Mr. Kruger's hands, and he thought he could pay the mortgage less than a year, and then he told me that the mill was doing a good
309 business now, and he told me I should never have any trouble; that he should pay that mortgage with the first money that was made with the mill; then I told him I did not like to do that after that year, after that I thought may be it was no harm for me to do it.

5. I told him I had a big family to look after; that Mr. Werges was getting old, and I always thought that we had enough in the mill.

7. The mortgage was signed by me in Mr. Hatch's office at McGregor, Iowa.

8. The next day after Kruger was at my house.
9. At that time I signed one paper at Mr. Hatch's office.
310 10. The paper I signed was a big paper.
11. That is all I know about it.
12. I had no talk with Mr. Hatch about the paper.
13. Mr. Hatch didn't talk with me about the business.
14. I made a mistake in my former answer. Mr. Hatch did ask me if I knew what that paper was for, and I said yes. I supposed I was signing what Mr. Kruger asked me—the mortgage.
15. Me and Mr. Werges and two strangers were in the office at the time.
16. Do not know where Mr. E. H. Kruger was that day.
18. Had no conversation the day before about signing any other paper than the mortgage.
311 19. There was no conversation with any one at Mr. Hatch's office about my signing any other paper than the mortgage.
20. I did not at that time intend to sign any other paper than the mortgage.
21. I was never asked by any one to sign any other paper than the mortgage.
22. After signing the mortgage I never saw any paper connected with that business.
23. Don't know anything about what papers were signed by my husband at Mr. Hatch's office that day.
24. Cannot read English writing.

Cross-examination.

2. Have never seen the original note in suit.
312 3. Have never seen any note purporting to be signed by myself and husband, or either of us.

* * * * * *

Joseph J. Mersman. Direct Examination.

3. The name, Lucy W. Werges, was subscribed to the note in suit before it came into my possession.
4. When received by me the note had signatures of both defendants to it.
5 Q. State whether or not, before the filing of defendants answer herein, you had any knowledge, notice, information, or inti-
313 mation from any source whatever that what purports to be the signature of the defendant, Lucy W. Werges, to said note was not her genuine signature, or that she had not executed said note jointly with defendant, Casper A. Werges?

A. I first was informed by my attorneys, I think not more than eight or ten days ago. I don't know when defendants filed their answer; bu. previous to this information by my attorneys, I had no knowledge or information on the part of defendant or Mrs. Lucy Werges.

6 Q. State whether or not any one, and, if so, whom, acted as your agent in negotiating the loan for which said note and mortgage ——

314 Ex. "B." Wm. D. Or.

Office of Orthwein & Mersman,
St. Louis, *Aug.* 31*st*, 1870.

Messrs. Kruger, Werges & Co., *Clayton City.*

Gents: Your favor of the 27th inst., addressed to Orthwein & Mersman, to hand. I have this day placed to your credit $6,000, for which Mr. Werges and wife will execute their note, secured by deed of trust in a proper and legal form to me, Joseph J. Mersman, of the city of St. Louis, State of Mo., note payable in one year from this date, to bear interest at the rate of 10 per cent. pr. annum, payable semi-annually.

If your laws make it necessary, Mrs. Werges must relinquish her dower and right of homestead. I appoint John C. Nulson, of this city, as my trustee.

In case of foreclosure, the property to be advertised 30 days in some paper published in the county where the property is
315 situated. Mr. Werges may have the privilege of having the land sold either at the east front door at the court-house in St. Louis, Mo., or at the court-house door in your county.

You will send me with the deed of trust, an abstract of the title to be made by some good lawyer or clerk of your circuit court, showing that the lands are unincumbered up to date; also, Mr. Werges' deed or deeds for the lands, to assure myself of the correct description of same in trustee.

This deed or deeds I will return immediately. If you prefer, Mr. Werges can make the deed of trust and note payable to E. H. Kruger, and by him endorsed over to me. This will give the transaction the appearance of being a settlement of Mr. Werges & Kruger. Your draft for $1,500 has been duly honored to-day; also $2,000, sent you as requested, relying implicitly on your
316 statement that Mr. and Mrs. Werges will execute that deed of trust as promised. You will give this matter now your immediate attention, and forward to us the deed of trust as soon as recorded, with Mr. Werges' deed or deeds and abstract of title. In the deed of trust you will insert the clause that in case Mr. J. C. Nulson, trustee, should not be able to act as such, through death, absence, or any other cause be prevented. the sheriff of the county (naming the county) may proceed to sell the same in place of said trustee. If the deed of trust is not already executed, you may make it for $8,000 in the place of $6,000, You will no doubt often need more [than] the last sum.

Yours respectfully, JOS. MERSMAN.

317 "C"—W. D. O.

OFFICE OF ORTHWEIN & MERSMAN,
No. 12 Commercial Street,
General Commission Merchants,
ST. LOUIS, *August 31st*, 1870.

Messrs. KRUGER, WERGES & Co., *Clayton, Iowa.*

GENTLEMEN: Your favor of 27th inst. is to hand. Draft of $1,500 is paid, and enclosed we hand you draft on N. York for $2,000, for which you will please also credit us $1.00 for premium paid. As soon as your deed of trust arrives Mr. Mersman will turn the $6,000 over to us for your ac't. You will now keep us always well posted on what you are doing. Wheat, we think, has no danger of getting higher for the present; at the same time we don't think it will go any much lower, and you might as well take hold of it freely. Take all you can get on regular market, and run as full as the present wheat you get permits
318 it.

Yours truly, ORTHWEIN & MERSMAN.

You might ship about half to Lathrop, in N. York; also a little to Freeman & Co., and in Boston, to Chickering. We will also find another house besides Chickering, in Boston, so you have two houses in each place.

319 KRUGER, WERGES & Co.,
Proprietors of Clayton Brick Mills and General Produce Dealers,
CLAYTON, IOWA, *Sept.* 5, 1870.

Messrs. Orthwein & Mersman, St. Louis.

GENTLEMEN: Your favor of the 31st ult. came to hand, contents fully noted; also have rec'd enclosed check on N. York for two thousand ($2,000), which is placed to your credit.

In regard to a trust deed on Werges' farm, E. H. Kruger has consulted some of the best lawyers in McGregor. They say that a deed of trust has run out in this State, and that a trust deed can have only the effect of a mortgage, as a trust deed can not be so made to allow the trustee to sell the court without a decree of court. I enclose few lines, written by the lawyer, to send to you. Mr. Werges and Mrs. Werges have therefore executed a mort-
320 gage in place of a trust deed, on the first day of Sept., 1870, for $6,000, and note to the same effect, to accompany mortgage, which I have sent to our county court, Elkader, on the 2d inst., for recorder. Mr. Werges' farm is unincumbered, but if you wish to have an abstract of title, will get it and send it to you with his deed. Sorry that your letter came in too late, as the mortgage was executed and sent already for recorder, to make it $8,000 in place of $6,000.

Wheat is selling here from 75 to 80 per bu. for choice No. 1

weighing from 60 to 63 lbs. to the measured bus. But it is not arriving very freely, as farmers are holding back for high prices. Barley we have not bought any as yet; [Jo] is in the market buying all the barley he can get, paying from 75 to 80 cts., and shipping it
321 to Chicago. Is it safe to pay prices to ship to St. Louis? Our quality of barley here is fair. It is not quite as white as the sample Mr. Kluensmith had on 'Change when I were in St. Louis; it looks some darker, but it is sound otherwise, weighing from 46 to 48 per bu. Will start the mill to-morrow, and send the mortgage as soon as recorded.

Yours, very truly, KRUGER, WERGES & CO.
Per E. H. KRUGER.

322 No. 12.

ST. LOUIS, *Sept'ber 16th*, 1870.

Messrs. Kruger, Werges & Co., Clayton City, Iowa.

GENTLEMEN: Your favor of the 13th inst. is to hand covering bldg. of 100 bbls. Victoria; are sorry to hear wheat come in so very slow, for it looks as we would have no further decline in flour East now. Barley at 75–80 is too high for *our* market.

Chicago market is higher on barley than ours, hence Chicago shippers can afford to pay those prices.

Your quality, we think, would do well enough, but it would not bring over 90c. to-day.

Enclosed please find N. Y. Exchange for $1,500, and to-morrow we will send you another $1,500. There is no premium on this, so you can credit us $1,500 even.

Yours, truly, ORTHWEIN & MERSMAN.

323 The papers have arrived, and when examined will return Mr. Werges' deeds.

No. 11.

ST. LOUIS, *Sept'b'r 16th* 1870.

E. H. KRUGER, Esq., *Clayton.*

DEAR SIR: Enclosed I return you deeds of the Werges—the mortgage I find so far correct, except I doubt whether the mortgage carries the dower of Mrs. Werges. If you see your lawyer, you will please ask him about it. It may be that her signing the note carries the dower; but, nevertheless, I wish you to inquire about it.

Yours, truly, JOS. J. MERSMAN,
Per CHAIFE.

Of what thickness are the walls of the warehouse you want me to purchase—the cellar walls as well as of the other stories.

J. J. M.

324 KRUGER, WERGES & Co.,
Proprietors of Clayton Brick Mills and General Produce Dealers,
CLAYTON, IOWA, *Sept.* 22, 1870.

Messrs. ORTHWEIN & MERSMAN, *St. Louis.*

GENTLEMEN: Your favor of the 16th inst. received; also draft for $1,500, which is placed to your credit, but is all paid out again. Wheat is coming in more freely. Hope you have sent the other fifteen hundred, $1,500. If you can, please send us $3,000 per week. If wheat keeps on coming in as it has we can get off 100 bu. per day, any way. E. H. Kruger has seen the lawyer in regard Mrs. Werges' dower; he says in this State a mortgage and note signed by the woman forfeits every thing. Inclosed please find bl. for 100 b'rl Granada; also, enclosed find a letter directed to us of ——.

Have you seen about another house in Boston, besides
325 Chickering, as we will make some Boston flour soon.

Yours, truly, KRUGER & WERGES.

326 ST. LOUIS, *March 3d*, 1875.

Mr. CASPER WERGES, Esq., *Clayton, Iowa:*

Your letter of the 24th of February, which was directed to Messrs. Mersman, Orthwein & Nuls., probably Nulson was meant, was received on the 27th of February. Since Messrs. Orthwein & Nulson have nothing to do with the deed of trust of your firm, and have no interest in it, it is my sad duty to reply to your letter. It appears that the deceased, E. H. Kruger, deceived all his friends and acquaintances. He assured me this, that your mill had no other debts, except the $25,000, and between eight and nine thousand dollars from Messrs. Hanschen & Orthwein.

He also assured me that you wished very much to continue carrying on the mill, and that he was certain you were very ready
327 to give me security by deed of trust on your farm; that he would, moreover, exactly represent that to you, and if you were not satisfied with it, he would improve his own farm. I also soon after received a letter in which your complete satisfaction with the arrangements was communicated to me. The sum, $6,000, which you shortly after received had for three years been loaned here on a fine three-story corner house. The interest also, 10 per cent., was punctually paid me every three months. The principal had just become due. I called in the money, the amount paid, and you received the money for your deed of trust, which was subscribed by yourself and your wife. Now, my dear Mr. Werges, I need only say to you that I am over fifty years old; that for nine years I have been completely blind; that I have a wife, be-
328 sides eight children, living, and you will easily understand that it would be kind of robbery if in my condition [I] would make you a present of $6,000, especially since I hold this, moreover, lease more than this amount in your unlucky mill. But I am will-

ing to give you time, so you can easily make the money out of the farm. If you punctually pay the interest, $300, every six months, and at the end of each year pay from five hundred to one thousand of the principal you can peaceably remain on your farm. The interest is all paid on your note to the first of September, 1974, consequently, on the first day of March, day before yesterday, $300 interwere again due, which you will please send me in the course of six months. In six from now, on the first of September, send me
329 the interest again, $300, even amount, and on the first day of March, 1876, $300 interest and $500 of the principal; and in this manner continue until all is paid. If a large farm like your cannot make such easy payments, I would sell it, pay off the debt, and cultivate a smaller one. Will you now write soon and inform me what you intend to do, whether my plan satisfies you, or whether you have anything else to propose.

Respectfully yours, JOS. J. MERSMAN.

[Endorsed:] No. 707. Eq. Mersman *vs.* Werges *et al.* Complainants' abstract of evidence. Filed Oct. 16, 1880. E. R. Mason, clerk.

330 * * * * * *

They admit that on the first of September, 1870, a mortgage was executed, together with a note, for 6,000 dollars, payable one year after date, by Casper A. Werges, and that said note was made payable to E. H. Kruger under the express direction of Jos. J. Mersman.

* * * * * *

First. That I was to receive as security a mortgage or deed of trust on the farm of Casper A. Werges, represented to me by Kruger as being worth twelve thousand dollars, so much cash having been offered to him for it; that besides the interest of ten per cent. for all money advanced, the firm of Orthwein & Mersman was
331 to receive a commission of two and a half per cent. for running the business; that is, selling the products of the mill.

* * * * * *

The claims of the demised firm of Henschen & Orthwein was to be paid first; that as soon as the mill had made the money, and I had a verbal agreement with Haenschen & Orthwein that they would wait with their claim until Werges, Kruger & Co.'s mill had made and earned more money in their business, and that Kruger, Werges & Co. were not to be troubled or attached in any manner for the payment of this sum until they had made the money in this manner.

* * * * * *

1st X-interrogatory. When did you first know E. H. Kruger?
332 Answer. Well, I think it was in August—about the middle of August—I believe, in 1870.

* * * * * *

10th X-int. Now state, if you please, all of the contract or arrangement which you made with him in relation to the loan of $6,000.

A. Well, there was no contract made between me and Mr. Kruger at that time—only conditionally, that if Mr. Werges would secure the $6,000, which we all understood to be only a margin for the future business.

* * * * * *

A. Well, really, there was no contract whatever took place. I stated the conditions upon which I would make the loan to Mr. Kruger, and if that was made the business was to be carried
333 on, and if it was not made, the firm of Orthwein & Mersman would not advance the firm of Kruger, Werges & Co. any more money. That is really, then, the whole thing in a nut-shell.

* * * * * *

A. My own private money; yes, sir.

23 X-int. You afterwards received a mortgage from Mr. Krueger, did you not, executed by Mr. Werges?

A. Yes, sir.

* * * * * *

25th X-int. Did you make any contract in relation to the note and mortgage, different from the terms expressed in them?

A. With whom?

26 X-int. With anybody.

A. No, sir; with no one.

* * * * * *

39th X-int. Did you ever have any acquaintance with Mr, Werges?

A. How do you mean; with Mr. Krueger and Mr. Werges?
334 40th X-int. No; Mr. Werges alone.

A. Never spoke a word to him in my life.

* * * * * *

A. In one respect it was; It was indefinite as to time, but I stated to him (Mr. Krueger) previously, that I should stop supplies as soon as I could judge from the books that this loan of $6,000 to Mr. Werges, which he (Mr. Werges) was to put into the mill as a sort of a margin, was exhausted; I think that is about the substance of what I said.

* * * * * *

Mr. CROSBY. No; Mr. Gatch made out the mortgage.

* * * * * *

WITNESS. That was a deviation from what I had requested; I had requested a deed of trust, as our deeds of trust here are
335 much more to the point than a mortgage, giving us more privileges.

120 X-int. You did suggest to Mr. Kreuger that a mortgage should be made to him, did you not?

A. Yes, sir; in my letter of direction.

* * * * * *

131 X-int. After Mr. Krueger went home, did you not write to him suggesting that the Werges mortgage be made for $9,000, so they would probably need more money?

A. Not $9,000; I think I said $8,000.

132 X-int. Have you made effort to find the letter written by Mr. Werges after Mr. Krueger's death, referring to his mortgage?

A. Mr. Werges' letter to Orthwein & Mersman and Nulson?

133 X-int. Yes, that letter.

336 A. I have found that last summer while moving and overhauling all my papers, and have forwarded the same to Wright, Gatch & Wright, sometime last September.

134 X-int. I would like to have it to attach to your testimony.

A. They have it now; it is written in German.

* * * * * * * *

176 X-int. For what purpose did you direct the note and mortgage to be executed to Mr. Kreuger, instead of to yourself?

A. It is a known business rule.

Mr. CROSBY. That is a departure from the question.

Mr. ROMBAUER. That is correct, Mr. Mersman.

A. It is a known business rule to have every piece of paper that a capitalist or a man takes as security bear its own history on its face or back—back is face also.

337 I had never seen Mr. Werges although represented to me as a partner of Mr. Krueger. He had come to an understanding with Mr. Krueger; both of them wanted a certain amount of money, Mr. Werges personally was to give the security. I desired to have Mr. Krueger between me and Mr. Werges to show the manner in which the transaction had taken place, to have the piece of paper, which I got for my $6,000, as much as possible as plain as that piece of paper could speak how the business had been transacted.

* * * * * * * *

217 X-int. When was it that Mr. Krueger told you that he had between $40,000 and $50,000 in cash in the business in the old mill property?

338 A. During some of the conversation preceding my consent to make the loan.

218 X-int. What did he say with regard to the capital that the others put into the firm?

A. I think he stated that Mr. Werges had $9,000 in, and the other Mr. William Kreuger $5,000 or $6,000; I do not remember, it was my impression $5,000 all along.

* * * * * * * *

6th int. In speaking yesterday about this $6,000, Mr. Mersman,

you used the phrase: "That they were to be regarded as a margin." Now explain fully what you mean by the term, "margin."

A. A margin is a sum of money that a concern of that kind, like this mill, has to have, in order to guard against any immediate loss decline in the market.

339 The firm, the milling firm of Krueger, Werges & Co., didn't have any means left at all, so if the firm of Orthwein & Mersman had then began to advance them money, it would have been, in fact, the same thing as though Orthwein & Mersman had taken that mill and run it on their own account. In getting this loan of $6,000, which I made personally to one of the members of that firm, and getting security from him, the mill became owner of a sum of money which would guard against these daily fluctuations, you understand, and secure the firm of Orthwein & Mersman to the extent of $6,000, at least, against these fluctuations, against these probable, not probable, but may be losses that might take place if the market went down. That is what we call a "margin."

340 * * * * * *

A. Was willing that that should be done. My $6,000 was an independent thing altogether, you know.

* * * * * *

3 X-int. Did you have any copy, or the original answers to those questions, interrogatories, when you gave your testimony before the notary here?

A. I think I had copies of those papers, not the originals; I had copies of the original answers and interrogatories.

4 X-int. When and from whom did you receive them?

A. From our attorneys in Des Moines.

* * * * * *

20 X-int. Do you wish to be understood that you didn't intend to make any change?

A. I think I made several changes, not of any great importance, I think, as to the substance matter.

341 21 X-int. Had you received insstructions from your solicitor in respect to certain points?

A. Our solicitors told us that they were going over the same field that the defence did in their cross-bill, and that we were at liberty to give the same answers so far as we knew them to be correct.

* * * * * *

A. Mr. Mersman proposed to Kreuger that if they could secure him to the amount of $6,000 he would make them a loan of $6,000, which would give them a margin in the business, provided they could give him the necessary security.

381 X-int. Well, go on right along.

A. Krueger said there would be no trouble. They could 342 get that security. Werges had a good farm and would certainly not drop the business and secure Mr. Mersman for the $6,000.

382 X-int. You had nothing to do with the $6,000?

A. Nothing at all, but I was determined that our firm should make no advance unless they had money of their own in the business. Well, Krueger thought there would be no trouble in giving us security. Mr. Mersman gave him the instructions how he wanted to be secured. I was principally present; I only know the outlines; I know that Mr. Mersman——

Objected to, because the contract is in writing.

343 383 X-int. Well, what did Mr. Mersman state to Mr. Krueger?

A. I can't tell exactly the conversation; I only can tell the substance of what was done. Mr. Mersman wanted his $6,000 secured properly; if it was to be done by real estate, Krueger should have the papers made out up there, and have an attorney to see that it was done properly. He would trust it to them, relying on them that they would send him the proper papers.

* * * * * *

5 X-Q. Before you gave your testimony before Mr. Walbridge did you have a copy of your answer to cross-bill?

A. Yes, sir; I had a copy of them; I think I had them a
344 week or so; I can't tell exactly how long.

* * * * * *

7 X-Q. Then, before you came here, you had substantially written out your answers, hadn't you?

A. I had written certain points.

* * * * * *

345 United States Circuit Court, District of Iowa.

JOSPEPH J. MERSMAN *vs.* CASPAR A. WERGES *et al.* } No. 707. Eq.

It is hereby stipulated that the foregoing copy of extract of testimony taken in case of John C. Nulson, trustee, *vs.* William Krueger *et al.*, may be used in evidence the same as though taken in this cause.

(Signed) WRIGHT, GATCH & WRIGHT,
Solicitors for Complainant.

(Signed) PARSONS & RUNNELLS,
Solicitors for Respondents.

And on the 23d day of June, 1880, a mortgage was filed
346 in said cause, which is in the words and figures following, to wit:

347 Know all men by these presents, that we, Casper A. Werges and Lucy W. Werges, his wife, of Clayton county, and State of Iowa, in *consideration* of the sum of six thousand dollars in hand paid by E. H. Kruger, of Clayton county, and State of Iowa, do hereby sell

and convey unto the said E. H. Kruger the following described premises, situated in the county of Clayton, and State of Iowa, to wit:

The east half of the southwest quarter, the west half of the southeast quarter, and the southwest quarter of the northeast quarter of section No. thirty (30), and the northwest quarter of the northwest quarter of section No. twenty-seven (27), all in township No. ninety-four (94) north, of range No. three (3) west of the 5th P. M.,

348 and we warrant the title against all persons whomsoever.

To be void upon condition that the said Casper A. Werges shall pay to the said E. H. Kruger the sum of six thousand dollars, as follows, viz:

Five 50c. internal revenue stamp.
$2.00 U. S., C. W., Sept. 1, 1870, internal revenue stamp.

One year from date, with ten per cent. interest thereon, according to the tenor and effect of his promissory note of even date herewith.

Signed the 1st day of Sept., A. D. 1870.

(Signed) CASPER A. WERGES.

In presence of—

(Signed) L. W. WERGES.

L. W. Werges, translation.

Three 50c. internal revenue stamps.

349 STATE OF IOWA, } ss:
Clayton County, }

On this 1st day of September, A. D. 1870, before me, L. O. Hatch, a notary public in and for said county, personally came Casper A. Werges and Lucy W. Werges, his wife, to me personally known to be identical persons whose names are affixed to the above deed as grantors, and acknowledged the execution of the same to be this voluntary act and deed.

Witness my hand and notarial seal, the day and year above written.

[SEAL.] (Signed) L. O. HATCH,
Notary Public.

350 [Endorsed:] Mortgage. Casper A. Werges and wife to E. H. Kreuger. Filed for record. 2 day of September, A. D. 1870. Recorded in Book 12, page 175, of Clayton county records. W. D. Crooke, recorder; ———, deputy. Fees, 50c., paid. Filed June 23, 1880. E. R. Mason, clerk.

351 And on the 23d day of June, 1880, it being in the May term, in the record of the proceedings thereof in said cause is the following decree, to wit:

352 United States Circuit Court Court, District of Iowa, May Term, 1880.

WEDNESDAY, *June* 23, 1880.

JOSEPH J. MERSMAN
vs.
CASPER A. WERGES *et al.* } No. 707. Eq.

This cause came on this day and was submitted to the court upon the bill, answer, and replication, the depositions on file in the case, and documentary proofs. Complainant appeared by Wright, Gatch & Wright, and defendants by Parsons & Runnells, and the court having heard the evidence and arguments of counsel and being now fully advised in the matter, ordered, adjudged, and decreed that the complainant's bill of complaint be dismissed with costs, and the defendant go hence without day, and recover his costs, to be
353 taxed by the clerk, and that proper process issue for the collection of the same. The complainant thereupon prays an appeal to the Supreme Court of the United States, which is allowed upon filing a bond in the penal sum of one thousand dollars, to be approved by one of the judges of this court.

354 And on the 8th day of November, 1880, an appeal bond was filed in said cause, which is in the words and figures following, to wit:

355 Know all men by these presents, that we, Joseph J. Mersman, principal, and Chas. F. Orthwein, as sureties, are held and firmly bound to Casper A. Werges and Lucy W. Werges in the sum of $1,000, to be paid to Casper A. Werges and Lucy W. Werges, their heirs, executors, or administrators, of which payment, well and truly to be made, we bind ourselves, our heirs, and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 15 day of October, A. D. 1880.

Whereas, at a term of the circuit court of the United States, 8th circuit, district of Iowa, in a suit depending in said court between Joseph J. Mersman, plaintiff, and Casper A. Werges and Lucy W. Werges, defendants, judgment was rendered against the said Joseph J. Mersman, and the said Joseph J. Merseman having ob-
356 tained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Casper A. Werges and Lucy W. Werges, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such that if the said Joseph J. Mersman shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his appeal, then

this obligation to be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] JOS. J. MERSMAN.
[SEAL.] CHAS. F. ORTHWEIN.

Witness:
CHAS. F. ORTHWEIN.

357 UNITED STATES OF AMERICA, *Eastern District of Missouri*, } *ss:*

I, Charles F. Orthwein, being first duly sworn, depose and say that I am the owner of real and personal property to the amount of more than $2,000 in excess of all exemptions.

(Signed) CHARLES F. ORTHWEIN.

Subscribed and sworn to before me, this 15th day of October, A. D. 1880.

[SEAL.] M. M. PRICE,
Clerk U. S. Cir. Court, East. Dist. Mo.,
By A. P. SELBY.

Approved and accepted.

(Signed) J. M. LOVE, *Judge.*

[Endorsed:] No. 707. Eq. Mersman *vs.* Werges *et al.* Appeal bond. Filed Nov. 8, 1880. E. R. Mason, clerk.

358 And on the 8th day of November, 1880, a citation was filed in said cause, which is in the words and figures following, to wit:

359 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Casper A. Werges and Lucy W. Werges:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the United States circuit court, for the district of Iowa:

Wherein Joseph J. Mersman is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Love, this 4th day of November, 1880.

J. M. LOVE, *Judge.*

Service accepted Nov. 8th, 1880.

J. O. CROSBY,
GALUSHA PARS S,
Sol's for Res'p't.

[Endorsed:] No. 707. Eq. Joseph J. Mersman *vs.* Caspar A. Werges *et al.* Citation. Filed Nov. 8, 1880. E. R. Mason, clerk.

360 United States Circuit Court, District of Iowa.

I, Edward R. Mason, clerk of said court, do hereby certify that the foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings and record entries, and all things concerning the same, in a certain cause wherein Joseph J. Mersman is complainant, and Casper A. Werges *et al* are defendants, as full, true and, complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the return of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said court, at Des Moines, in said district, this 14th day of December, A. D. 1880.

[SEAL.] E. R. MASON,
Clerk U S. Circuit Court, District of Iowa.

Endorsed on cover: Iowa C. C. U. S. No. 242. Joseph J. Mersman, appellant, *vs.* Caspar A. Werges and Lucy W. Werges. Filed 28th April, 1881.

112-135

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSEPH J. MERSMAN, COMPLAINANT AND APPELLANT,

vs.

CASPER A. WERGES AND LUCY W. WERGES,
RESPONDENTS.

ARGUMENT FOR COMPLAINANT.

P. C. Kenyon, Publisher Law Briefs, Des Moines, Iowa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSEPH J. MERSMAN,
Complainant and Appellant.

vs.

CASPER A. WERGES AND LUCY W. WERGES, *Respondents.*

ARGUMENT FOR COMPLAINANT.

STATEMENT.

This suit was commenced in the Circuit Court for the District of Iowa, in 1876, for the foreclosure of a mortgage executed September 1, 1870, by the respondents, Casper A. Werges and Lucy W. Werges, husband and wife, to the complainant, Joseph J. Mersman, on certain premises therein described, to secure an indebtedness of $6,000 on account of money loaned by complainant to the respondent, Casper A. Werges, for the benefit of a firm of which he was a member, and composed of himself, one E. H. Kreuger, and one Wm. Kreuger. The language of the defeasance is—

> To be void on condition that the said Casper A. Werges shall pay to the said E. H. Kreuger the sum of $6,000, as follows: One year from date, with 10 per cent. interest thereon, according to the tenor and effect of his promissory note of even date herewith (Fol. 13).

The loan was evidenced by a note of which the following, omitting the signature, is a copy:—

$6,000. McGREGOR, September 1, 1870.

One year from date, for value received, I promise to pay E. H. Kreuger or order, six thousand dollars, with ten per cent. interest.

Endorsed—

E. H. Kreuger to Joseph J. Mersman.

The note was signed by Casper A. alone, but subsequently, without the knowledge or consent of either of the respondents the name of Lucy W. was written immediately below his. By whom it was placed there does not clearly appear, nor does the precise time when it was done.

The circuit court found and held that the addition was made by E. H. Kreuger without the knowledge or consent of Mrs. Werges; that the note and mortgage were thereby invalidated, and the right of complainant to a foreclosure of the mortgage lost, and thereupon dismissed the bill.

The only question in the case is as to the effect of this alteration of the note upon the note and mortgage.

The amended bill (72–78), in substance, avers that Casper A. Werges, on the 1st day of September, 1870, applied to complainant for the loan of $6,000 on the security of the premises described in the mortgage, and then delivered to E. H. Kreuger, as his note in the above form, signed by himself only; that respondents on the same day to secure repayment of the proposed loan, executed and delivered to said Kreuger the mortgage in question; that the note and mortgage were so made and delivered to Kreuger as the agent and for the accommodation of Werges, and that after the same were so delivered, but before their delivery to complainant, what purports to be the signature of Mrs. Werges as one of the makers of the note, was, by some person to complainant unknown, subscribed thereto under that of her husband; that Kreuger, still having the mortgage in his possession, on the 2d day of September, 1870, filed and caused the same to be recorded in the office of the recorder of Clayton county, Iowa, in which county the land is situated; that after the same was so recorded

Kreuger delivered it with the note to the firm of Kreuger, Werges & Co.; that the proceeds of the proposed loan were intended for the use and benefit of said firm in their firm business, and that the note and mortgage were transmitted by the firm from Clayton, Iowa, its place of business, to complainant at the city of St. Louis, and that on the receipt of the same, complainant advanced and paid on the security thereof to said Casper A. Werges, for the use of the firm, the $6,000 intended to be evidenced and secured thereby; that no payment, except of interest, has been made; and asking that an account be taken of the amount due, and concluding with the usual prayer for relief.

Respondents, by separate answers (80–92), deny specifically each of the allegations of the amended bill, and for further answer aver and charge that E. H. Kreuger, *acting as the agent of complainant*, procured the note to be executed by respondent Casper A., and that it was afterwards fraudulently altered by said Kreuger by the addition thereto, without authority, of the name of Mrs. Werges; that the mortgaged premises belonged to Mrs. Werges, and that there was no consideration for the execution of the mortgage.

To each of the answers complainant filed a general replication (94–8).

It is not questioned that Mrs. Werges executed the mortgage for the purpose and with the intention, of thereby uniting with her husband in securing the proposed loan; but it is contended that both the mortgage and note were avoided by the alleged fraudulent alteration of the note.

The questions, therefore, are:—

1. Did the addition of the name of Lucy W. Werges, under the circumstances, have the effect of avoiding the note;

2. If so, was the mortgage, also, thereby avoided; and

3. If not, was complainant entitled to a decree foreclosing the mortgage given to secure an indebtedness of which the note was only intended to be evidence?

Prior to July, 1870, the firm of Hanschen & Orthwein were commission merchants at St. Louis, Missouri, and as such, had transacted a large amount of business for the firm of Kreuger, Werges & Co., which last named firm was engaged extensively in the milling and produce business, at Clayton, Iowa. During the month named, the firm of Hanschen & Orthwein was dissolved, by the withdrawal of Mr. Hanschen, and was succeeded by the firm of Orthwein & Mersman, Mr. Mersman taking, in the new firm, the place of Hanschen in the old. There was, at this time, a large balance due from Kreuger, Werges & Co. to Hanschen & Orthwein on account of advances to them on overdrafts, drawn to enable them to carry on their business—these advances, at times, amounting to over $60,000 (depositions of Mersman, 190–91, and C. F. Orthwein, 294–6).

On account of this large indebtedness to the old firm, contracted in the manner it had been, and which was to be first paid (Mersman's deposition 279–80), the new firm, at first, declined to carry the business of Kreuger, Werges & Co. (*Id.*, and C. F. Orthwein's deposition 294-6). But finally, upon their agreeing to raise $6,000, by loan of complainant, on the security of the premises in controversy, to put into their business, consented to do so. This loan was negotiated by E. H. Kreuger, for the benefit of the firm, and the money was to be used in carrying on their firm business (C. F. Orthwein's deposition 294-6, and Mersman's 279-80, 306).

That Kreuger was not, in any sense, the agent of complainant, is evident, first from the nature and object of the transaction, and second, from the testimony of the witnesses (depositions of Mersman—185-6—C. F. Orthwein—212-13-223—W. D. Orthwein—232-3-245).

Notwithstanding the note was made payable to Kreuger, the admitted facts and circumstances show beyond any question that it was not in fact to be payable to him, as he neither did nor was expected to pay any consideration therefor.

Both Kreuger and Werges, when the latter signed the note,

contemplated that complainant would be its first holder for value, and therefore, the real payee (depositions Mersman, 79–80, and C. F. Orthwein, 294–6).

C. F. Orthwein, in his deposition, says (294–6): "The condition upon which Orthwein and Mersman consented to carry the business of Kreuger, Werges & Co. was that the amount of this loan should be added to their capital as a margin for contingent losses."

It does not appear when or by whom the alleged alteration was made, but respondents aver that it was before the note was mailed at Clayton, Iowa, to Orthwein & Mersman, at St. Louis, for complainant, and that it was made without complainant's knowledge (depositions of Mersman, 183–4, 186, 194–5; C. F. Orthwein, 210–11, 213, 218; W. D. Orthwein, 230, 232–3).

It further appears that the alleged forged signature *is not in the handwriting of Kreuger* (deposition of W. D. Orthwein, 230).

The consideration for the note and mortgage was not to be paid until they were made out and delivered to complainant at St. Louis (deposition of Mersman, 186–8, 194, 204, 284).

The advances of $1,500 and $2,000, referred to in the letters of Orthwein & Mersman and of Mersman (314–318) respectively, to Kreuger, Werges & Co., of August 31, 1870, were for the time being only credits to Orthwein & Mersman, in account with Kreuger, Werges & Co., and not part payment of the consideration of the note and mortgage which bear a later date, September 1, 1870. In the letter of Orthwein & Mersman referring to these advances, it is said: "As soon as your deed of trust arrives, Mr. Mersman will turn the $6,000 over to us for your account."

It was the understanding of both Kreuger and Mersman that the note was to be signed by Mrs. Werges. In the letter of Kreuger, Werges & Co. to Orthwein & Mersman dated September 5, 1870 (319–21), acknowledging receipt of letter above referred to of August 31, 1870, from Orthwein & Mersman to them, it is said, "Mr. Werges and *Mrs. Werges* have therefore

executed a mortgage in place of a deed of trust, dated the 1st of September, 1870, for $6,000, *and note to the same effect* to accompany mortgage." In another letter from Kreuger, Werges & Co. to Orthwein & Mersman, dated September 22, 1870 (324), it is said, "E. H. Kreuger has seen the lawyer in regard to Mrs. Werges' dower. He says, in this state a mortgage *and note signed by the woman* conveys—misprinted "forfeits" —everything." In the letter dated September 16, 1870, from Mersman to E. H. Kreuger (323), it is said, "It may be her signing the note carries the dower, but, nevertheless, I wish you to inquire about it."

On full hearing on the merits the circuit court dismissed complainant's bill upon the grounds and for the reasons stated in the opinion printed on pages 27–32 of the record.

ASSIGNMENT OF ERRORS.

Complainant says the court, in said decision and opinion, erred in holding and deciding—

1. That the alleged alteration of the note was made by E. H. Kreuger.

2. That the defendant, Lucy W. Werges, was a surety in the contract, evidenced by the note and mortgage.

3. That the alleged unauthorized addition of the name of Lucy W. Werges to the note was a material alteration of the contract, evidenced by the note and mortgage.

4. That by the addition of the name of Lucy W. Werges to the note she became a principal instead of an accommodation party to the contract.

5. That the alleged alteration was material as against complainant, having been made before the note had come into the possession of any holder for value.

6. That the relation of E. H. Kreuger was such in the transaction, to complainant, as that the alteration, if made by him, would affect complainant's rights.

7. That in order to maintain the suit upon the mortgage alone, it would be necessary to treat the defendant, Lucy W. Werges, as a joint debtor with her husband, Casper A. Werges.

8. That even though the mortgage were not affected by the alteration, the bill must, at that stage of the cause and in the condition of the pleadings, be dismissed for want of jurisdiction, on account of the citizenship of the parties.

9. In dismissing complainants' bill and refusing to grant the relief prayed by complainants therein.

POINTS OF FACT AND LAW.

From the foregoing statement are deduced and respectfully submitted the following propositions of fact and law:

1. The addition of another name to a note as maker without the consent of the previous signers is not a material alteration, and especially is this so if with the added name there are but *two* signers.

2 Dan. Neg. Ins., Section 1389.
Brownell vs. *Winnie*, 29 N. Y., 400.
Montgomery R. R. vs. *Hurst*, 9 Ala., 515.
Miller vs. *Finley*, 26 Mich., 248.
Ward vs. *Hackett*, 30 Minn., 150.
Snyder vs. *Van Dorn*, 46 Wis., 602.
Cattan vs. *Simpson*, 8 A. and E., 136.
Iowa Code, Section, 2204.

first holder, for value, the alteration, therefore, [illegible] contemplation been made before the note was *issued*, is immaterial and can in no way affect complainant's rights thereunder.

2 Parsons N. & B., 573.
Daniels, Secs. 1388–9.
Hall's Adm'x vs. McHenry, 19 Iowa, 521.
Bishop vs. Chambre, 3 C. & P., 55.
Downes vs. Richardson, 5 B. & Ald., 680.
Clifford vs. Parker, 2 Man. & G., 908, note A.

In *Hall's Adm'x vs. McHenry*, it is said on page 524—referring to numerous cases and text books—

> These cases and authorities, as far as we have been able to examine them, treat of the doctrine as applied to a note *fully* issued and delivered, and when the name is *afterwards* obtained at the instance of the payee or with his knowledge and consent, without the consent of the original maker or makers.

In *Downes vs. Richardson*, on page 370, it is said:

> Undoubtedly when an accommodation bill has the names of different parties written upon it, it is in some sense of the word a bill of exchange, but it is utterly invaluable as a security for money until it has issued to some real holder for valuable consideration.

And again, on page 371:

> Then, when is a bill issued? I am of the opinion that it is issued as soon as there is some person who can make a valid claim upon it.

In 2 Parsons, N. & B., page 573, it is said:

> From all the cases we may collect that a bill or note must not be altered after issue. It is issued as soon as, and not before, it comes to a person capable of enforcing it. Accommodation acceptances, therefore, as to the question of alteration, are negotiated by being exchanged.

3. What purports to be the signature of Mrs. Werges, according to the testimony of W. D. Orthwein, above referred to, is not in the handwriting of Kreuger, the nominal payee, and there is no pretense that it is in the handwriting of the complainant, nor is there any evidence showing that it was done with the consent or knowledge of either of them. The alleged alteration, therefore, if made, was made by a stranger to the note, and for that reason is immaterial so far as the rights of complainant are concerned.

2 Parsons, N. & B., 574, and notes.

4. Complainant understood—as is clear from the correspondence—that the note was to be signed by Mrs. Werges; the alteration was made without his consent or knowledge and he advanced the entire consideration—$6,000—in the honest belief that what purported to be was, in fact, the genuine sig-

nature of Mrs. Werges. Should the alteration, therefore, be held to have destroyed the note as the foundation of an action, complainant is entitled to recover upon the original consideration.

2 Parsons, N. & B., 572–3.
Atkinson vs. Hawdon, 2 A. & E., 628.
Sutton vs. Toomer, 7 B. & C., 416.
Tatlock vs. Harris, 3 D. & East., 85.
Boardman vs. Gore et al., 15 Mass., 330.
Chete vs. Small, 17 Wend., 239.
Merrick vs. Bourg, 4 Ohio St., 60.

In *Alderson vs. Langdale*, 3 B. & Ad., 660, a recovery upon the original consideration was denied only because the plaintiff who was the indorsee of a bill of exchange had discharged the acceptor by a material alteration *after* acceptance, whereby he made the bill his own. In *Merrick vs. Bourg*, *supra*, the court, on page 69, referring to this decision, say:

> It is very evident, therefore, that the ground of the decision was the injury done to the drawer by the release of the acceptor and that ground is, no doubt, quite sufficient. But here no third person has been released, and no injury is done to Merrick by compelling him to pay what he justly owes.

And again, on page 70:

> It is difficult to perceive how destruction without fraud, of a mere security given by the debtor himself, and the destruction of which can in no event prejudice him, can operate to discharge the precedent debt.

Masters vs. Miller, 4 D. & East., 188, was an action by an indorsee against the acceptor of the bill of exchange which had been materially altered while in the hands of the payee and before the indorsement; it was held that "no recovery could be had upon the original consideration" because such a right of action was not assignable in the then state of the law upon that subject. BULLER, judge, on page 204, uses the following language:

> Still it must be admitted that though the courts go the length of taking

notice of the assignment of *choses in action*, and have acted upon that, yet in many cases they have adhered to the former belief that the action should be brought in the name of the assignor and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance of it is gone; and that it is merely a shadow is apparent from the later cases in which the court has taken care it shall never work injustice.

As actions may, under the law of Iowa, be prosecuted by the assignee of a *chose in action* in his own name, and the reason for the rule applied in that case having therefore ceased, the decision, instead of being against us is in our favor. But the question as to whether or not the transfer of the note in controversy to complainant carried with it an assignment of the cause of action upon the original consideration, could not in any event have arisen in this case, for the reason that the complainant himself paid the consideration.

5. The alteration complained of was made before the note came into complainant's possession, and not being a party thereto the burden is not upon him to show how or when, or by whom the same was made.

2 Parsons, N. & B., 575 and 578.
United States vs. Linn, 1 How., 110 and 111.
1 Greenleaf on Ev., Sec. 564.
Herman vs. Dickerson, 5 Bing., 183.
Bishop vs. Schambre, *supra*.
Simpson vs. Stackhouse, 9 Barr., 186.
Wilde vs. Armsby, 6 Cush., 319.

In 2 Par., 575, *supra*, the reason for the rule requiring plaintiff to explain alterations is thus stated:

The instrument is in his hands; if it has been tampered with it has been done either by him or by his connivance or by his negligence.

And again, on page 378:

But every one ought to know enough and to think enough of what he is doing not *to take* so important an instrument as a note or bill *on the very face of which* such a taint as that of obvious alteration attaches without possessing the means of explaining it.

6. This is a suit to foreclose a mortgage given to secure the debt itself and not the evidence of the debt. The language of the mortgage is—

> To be void upon condition that the said Casper A. Werges shall pay to the said E. H. Kreuger the sum of $6,000, as follows, viz.: one year from date with ten per cent. interest thereon, *according* to the tenor and effect of his promissory note of even date herewith.

In *Williams vs. Starr*, 5 Wisconsin, 534, which was an action to foreclose a mortgage, the notes described in the mortgage having for some reason, after the execution of the mortgage been given up and new ones substituted, this fact was pleaded as a satisfaction and discharge of the mortgage, but the court, on page 548, say:

> The notes given were but the evidence of the debt which the mortgage was given to secure. The condition of the mortgage is that the mortgagor shall pay or cause to be paid the sum of $1,546.26, *according* to the condition of four promissory notes, etc. The substituting of other notes for the same amount was not a discharge of the debt. The new ones took the place of the old ones, leaving the indebtedness unaffected by the transaction.

7. The note, as described in the bill as amended, is precisely the note which the defendant, Mrs. Werges, according to her own testimony, intended to secure by the execution of the mortgage, and the alleged alteration having been made without the fault of the complainant, and no actual prejudice having resulted to her, she cannot be heard to complain.

Wood vs. Steel, 6 Wall., 80, heretofore relied upon by defendants' counsel, is not in point, for the reason that it is not claimed that Mrs. Werges is liable on the *note* to which the alleged alteration alone relates. The note in question in *Hamilton vs. Hooper*, 46 Iowa, page 515, also relied upon by them, was "fully executed and delivered" before the additional signature was procured.

It will be claimed, on behalf of respondents, that the note was "issued" to, and became a "completed instrument" in the hands of, E. H. Kreuger; that, while in his hands, Kreuger

forged the signature of Lucy W. Werges; that the note and mortgage must be treated as one contract, and therefore that the avoidance of the note by the assumed forgery had the effect of also avoiding the mortgage; and that whether or not this last be true, the mortgage being non-negotiable, and both the mortgagee and mortgagors being citizens of the state of Iowa, complainant, as assignee of Kreuger, though a citizen of Missouri could not sue in a federal court.

That Kreuger was but nominally payee and mortgagee is clear from the fact that he was not only not a "holder for value," but a member of the firm of Kreuger, Werges & Co., for whose benefit the note and mortgage were executed. As agent of his firm he went first to St. Louis, then east, and then returned to St. Louis to negotiate a loan, which he finally succeeded in negotiating with complainant through perseverence and much importunity (depositions of Mersman, 279, 280, and C. F. Orthwein, 294–6). In his letter to Kreuger, Werges & Co., of August 31, 1870 (314–16), *only the day before the note and mortgage were executed*, complainant wrote, "Mr. Werges and wife will execute their note, secured by a deed of trust, in a proper and legal form *to me, Joseph J. Mersman*" etc., or, "*if you prefer*, Mr. Werges can make the deed of trust and note payable to E. H. Kreuger, and by him *indorsed* over to me." Indorsed when? Grammatically it *may* certainly mean *before making*, and for at least apparently good reasons might have been so intended. In that case it would follow that even the legal title was never in any sense in Kreuger, but vested at once on the signing or making of the instrument in complainant. Regardless of *when* made, the indorsement must necessarily have been made by Kreuger, to, *in form*, invest complainant with title. This letter, it will be observed, was addressed to Kreuger, Werges & Co., for whose benefit the loan was made, and the note was in terms to be made payable to Kreuger, only in case *they should so prefer*. It was, therefore, evidently at the instance of the firm of which Casper A. Werges was himself a member, that Kreuger was

named as payee and mortgagee, and if Kreuger was for any time permitted by them to have the custody of the note it was as their agent.

That the alteration was, in fact, made by Kreuger, is not shown by or fairly inferable from any evidence in the case. The circumstances referred to by his Honor, the Circuit Judge, before whom the case was tried, as showing quite conclusively to his mind that it was, are stated to be (125) first, that he had an interest in doing so, being interested in the proceeds of the note—since without the additional signature, there might have been difficulty in consummating the loan—and second, that having the note in his custody, he and no one else, had the opportunity to do so.

Against the conclusiveness, certainly, of the first circumstance, it appears that Wm. Kreuger was a partner in the business in which the money was to be used, and therefore had the same interest and motive to make the alteration as had E. H. Kreuger, while as to the other, it appears from the testimony of the respondents that E. H. Kreuger was not present at the office of Mr. Hatch when the note and mortgage were executed, but that two strangers were (Mrs. Werges' deposition, 310), and Werges himself says (deposition, 260) that after the note and mortgage were signed, he went out of the office, and on his return Mr. Hatch handed them to him in an envelope, the contents of which, it appears, he did not examine. What is there, according to the line of reasoning adopted by the Circuit Judge, to show, or from which to presume, that after the note was handed to E. H. Kreuger on the following day, it may not have come into the possession of Wm. Kreuger, and the alteration have been made by him, who would thus have had opportunity and the same interest as E. H. in doing so?

While it is true that the note and mortgage were executed at the same time and might, for some purposes if necessary, be regarded as parts of the same instrument, as suggested by the

Circuit Judge, it is neither necessary nor proper that they should be so regarded for the purposes of this question. The mortgage clearly described and identifies the indebtedness to be secured and, had no note been given, would, without question, have been complete and sufficient in itself for all the purposes of evidencing the indebtedness, security and foreclosure—it being recited that it is to secure the payment by Casper A. Werges to E. H. Kreuger of "the sum of $6,000, as follows, viz.: One year from date, with ten per cent. interest thereon." The added words "according to the tenor and effect of his promissory note of even date herewith" are wholly immaterial, as all that a *promissory note* could properly contain is contained in the recital.

Assuming that the alteration of the note avoided it in the hands of complainant, but that the mortgage is not thereby avoided, is the fact of the non-negotiability of the latter a ground upon which the bill might properly have been dismissed?

The question of the liability of the defendant, Casper A. Werges, on the note, was not made as a jurisdictional question, and it could not have been so made as to have defeated the jurisdiction of the court to try the cause upon its merits.

The parties complainant and defendant were properly before the court for the trial of the cause upon every question involved in the ultimate question of liability of the defendant, Casper A. Werges, on the note and mortgage; and the pleadings and proofs necessary for the determination of these necessarily included everything essential to the question of his liability on the mortgage alone. Having rightfully acquired and exercised jurisdiction over the parties as to some of the questions involved, was jurisdiction lost as to other connected questions by the determination of the court with respect to these? The object of the suit is the foreclosure of the *mortgage* for the payment of the *debt*. The note is only material as evidence of

the debt and, according to all the authorities, its alteration without complicity or fault on the part of complainant will not defeat his right of recovery on the original consideration upon any competent evidence thereof. In this case, as already shown, it is sufficiently evidenced by the mortgage alone. It is also fully shown by the other proofs in the case, as are also the nature and character of the transaction throughout. All of the questions made arise legitimately as parts of one case, and in any other court, not subject to this kind of jurisdictional question, an adjudication upon the record here before the court, adverse to complainant, would conclude him from maintaining another suit of any kind upon the mortgage. Jurisdiction having rightfully attached, and been rightfully exercised as to the questions the decision of which the court could not refuse or escape, and having, furthermore, as to all questions liable to arise in such a case, been rightfully assumed upon the *prima facie* case made by the pleadings and proofs, was it liable to be defeated by any question arising in the progress of the hearing out of the case as made by the pleadings and proofs at its commencement? Does not such a case fall within the principle of the cases of *Morgan vs. Morgan*, 2 Wheat., 290, in which it was held that jurisdiction having once vested between citizens of different states will not be divested by the subsequent removal of one of the parties into the same state with the adverse party; *Clarke vs. Mathewson*, 12 Peters, 164, in which it was held that when, in a suit properly commenced between citizens of different states, one of the parties dies, and his executor or administrator happens to be a citizen of the same state with the surviving adverse party, the jurisdiction will not be thereby defeated; *Dunn et al. vs. Clarke et al.*, in which it was held that where judgment in ejectment had been recovered in an action between citizens of different states, a person who was trustee of the party who recovered the judgment, and as such held the land which was the

subject of the action, in trust under his will, might through a citizen of the same state with the complainants in a suit in equity the complainants in which were the defendants in the law action, be enjoined from issuing execution; and in *Freeman vs. Howe*, 24 Howard, 450, in which the court carried the doctrine, that when the jurisdiction of the court has once rightfully attached for one purpose it will be retained for all purposes of the case, so far as to hold that where a United States marshal had attached property under process from a United States circuit court in a suit between citizens of different states, an action of replevin in a state court of Massachusetts, of which state both the marshal and plaintiff in replevin were citizens, would not lie to take the property out of the possession of the marshal. To the objection that the question could not be litigated in the federal court between citizens of the same state, it was held to present no difficulty, "as those familiar with the practice of the federal courts have no difficulty in applying a remedy," upon the principle "that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit but ancillary and dependent, supplementary merely to the original suit out of which it has risen, and is maintained without reference to the citizenship or residence of the parties." If a separate though not original suit, "ancillary and dependant, supplementary merely to the original suit, out of which it has arisen," can be "maintained without reference to the citizenship or residence of the parties," why may not the complainant have in this suit any relief warranted by the pleadings and proofs, without reference to the jurisdictional question of the negotiability of the note, rather than that the jurisdiction of the court, rightfully assumed and exercised, should be defeated in the midst of the hearing on the merits. Would not the exercise of jurisdiction to decree

relief upon the mortgage and original consideration regardless of the note, be simply the exercise of jurisdiction *in* the original suit — instead of *supplementary to* it — ancillary to and dependent upon the jurisdiction already rightfully exercised as to the facts and questions out of which the necessity for the supplemental and ancillary exercise arises?

C. H. GATCH,
Solicitor for Complainant.

112-139

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 17.

JOSEPH J. MERSMAN,
COMPLAINANT AND APPELLANT,
vs
CASPER A. WERGES & LUCY W. WERGES,
RESPONDENTS AND APPELLEES.

BRIEF FOR APPELLEES.

GALUSHA PARSONS,
Of Counsel for Appellees.

Hotel News Print.

IN THE

SUPREME COURT OF THE UNITED STATES.

JOSEPH J. MERSMAN,
COMPLAINANT AND APPELLANT,
vs
CASPER A. WERGES & LUCY W. WERGES,
RESPONDENTS AND APPELLEES.

BRIEF FOR APPELLEES.

For the purposes of this brief, reserving their discussion for the oral argument if any question shall be made as to their correctness, I shall assume that the facts shown by the record, so far as material to the questions now here, are these:

First. That the defendant, Casper A. Werges, and E. H. Krueger, the payee in the note in question as in the mortgage given to secure it, were members of a firm of which one William Kureger was also a member, engaged in carrying on a mill at Clayton, Iowa, under the firm name of Kreuger, Werges & Co. E. H. Kreuger having the exclusive active management of the business, Mr. Werges living upon a farm some miles distant, and having but little knowledge of how it was carried on, and William Kreuger taking no part in it. That the property embraced in the mortgage was the sole property of the defendant, Lucy W., that she consented to mortgage it for the accommodation of Kreuger, Werges & Co., and without any consideration for so doing. We do not understand that these facts are questioned.

Second. That the note in question—Trans. p. 1—was not signed by the defendant, Lucy, but that her name

was placed there by the payee, E. H. Krueger, after it had been signed by her husband, Casper A., and delivered by him to Mr. Krueger. By the original bill the note was declared upon, as the note of both, but the amended bill declares upon it as the note of Casper only. It also alleges that the loan was made to Mr. Werges, not to the firm—*Id.*, 16, p. 16. *Id. Ans.* 6, 7 and 14. Testimony of Mr. and Mrs. Werges, 62, 63, and 74, 75.

The note was taken in this form by the express directions given by plaintiff to E. H. Krueger—*Id.* pp. 71, 77, 81, 85—to give it as he says the appearance of being what it was not, of a settlement between Krueger and Werges, by making the latter the debtor of one whom he did not owe, while incidentally securing to himself the advantage of appearing to be what he was not, a *bona fide* holder of a note drawing ten per cent. interest and two and a half per cent. of the gross product of the mill—*Id.* 68—say about one hundred per cent. in all.

The evidence shows that both the note and mortgage were obtained by fraudulent pretences—*Id.* 74, 75. The note and mortgage bear date September 1, 1870. The latter was recorded September 2, the money was placed to the credit of the firm *August* 31—*Id.*, p. 77. After the mortgage was recorded, it and the note were sent by Mr. Krueger by mail to the plaintiff at St. Louis, September 5, and it is conceded that when received by him the note was in its present condition—*Id.*, pp. 77, 81, 85—that the loan was designed by the plaintiff to be made to Mr. Krueger—*Id.*, 70, 71, 82, 84—and that in addition to what is above stated, that he wanted the note made in the form, that it was so that his own title should come by Krueger's endorsement—*Id.* 77 and 83, *Ans Id.* 6.

Third. That after the note was so delivered by Mr. Werges to Krueger, he, upon receiving the letter of August 31, above referred to, in which plaintiff suggested that the note be signed by Mrs. Werges, fraudulently signed the name of Mrs. Werges to it. This is shown, first, by the date of the letter, August 31, and the date of the note, September 1, the time of the recording of the mortgage, September 2, and the letter written by Mr. Krueger, in the name of his firm, of the date of September 5, transmitting the note to plaintiff, and in which he says it is signed by Mrs. Werges. Neither Mr. nor Mrs. Wer-

ges knew anything of these letters–*Id.* 26–26–61 postmark *Id.* 6, letter and stipulation 26, 78, and by a comparison of the indorsement of the note by him and *the name of Mrs. Werges*, as it appears upon the note, herewith produced for inspection; that he was the only person interested in signing her name, and the further fact that there is no evidence that the note was at any time out of his possession, until it was sent by him to the plaintiff. The note upon its face showed that it was not the note which the mortgage was given to secure the sole note of C. A. Werges, mortgage 85.

Upon these facts I suppose the legal questions to be these:

First. The effect of the alteration upon the note, as the note of Casper, if honestly made. As to the effect upon the mortgage I suppose it be precisely the same that it would have been if it also had been changed to correspond with the note in its altered form "*to be void upon* the payment by Casper A. and Lucy W., of their note," that they are as much parts of *one* contract as if included in the same instrument.

Second. Its effect if fraudulently made.

Third. Its effect upon the mortgage, as to both Mr. and Mrs. Werges, whether honestly or fraudulently made, and as to this there is possibly the further question of the time when made, whether before or after it was endorsed and sent by Krueger to the plaintiff, and whether, as matter of law, that would affect the question of the liability of the defendant, Casper as well as of his wife. We say it was, while it was in the hands of Krueger, but whether it was or was not, its legal effect would be to discharge both from liability upon the mortgage as well as to destroy the note.

First. Because it changed Mrs. Werges' relation from that of a surety for Mr. Krueger and his firm to his debtor; with an apparent right of action against her, instead of his being her debtor, in case she should be compelled to pay the note, or her property be sold.

Second. The jurisdiction of the circuit court attached only because of the negotiability of the note; that failing, the bill should have been dismissed. In my judgment the legal questions as to the effect of the alteration, both upon the note and mortgage, is settled by the

following cases:

[In all cases where I speak of *sureties* and their rights I apply that term to Mr. as well as Mrs. Werges, supposing both as to the paper in this form to be accommodation makers with all the rights as to any question here of sureties.]

First. Any alteration of a written instrument will discharge a surety. The rule is laid down by this court in *McVicker vs. Webb*, 6 How., 298, in these words: "A surety is said to possess an interest in the letter of his contract."

In *Smith vs. United States*, 2 Wall, 219, it is said. "Any alteration of an instrument discharges the surety."

In the case of *Martin vs. Thomas et al.*, 24 How., 316, upon a replevin bond, running to the marshal, the principal, with the consent of the marshal, erased his own name, which had been signed to the bond; held, the surety was discharged.

Miller vs. Stewart, 9 Wheat., 681, was an action against the sureties on a collector's bond, given for eight townships, the principal in the bond had altered it, so as to include nine. Story, Justice, said: "Nothing can be clearer, both upon principle and authority than that the liability of a surety cannot be extended by implication beyond the terms of the contract. He has a right to stand upon the terms of his contract; any variation in it is fatal. It is not sufficient that he may sustain no injury, or that it may even be for his benefit."

In *Leggitt vs. Humphreys*, 21 How., 71, this court said: "The rule is perhaps without exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their obligations."

In *Wood vs. Steele*, 6 Wall., 80, a change was made before delivery, as we understand counsel in this case to claim this to have been made, because it was made before delivery by Krueger to the plaintiff. I can see no distinction in principle between that case and this. The court held the surety discharged.

In *Adams vs. Frye*, 3 Met., 103, the court held that adding the name of a subscribing witness to the bond, voided it as to the surety. The reason was that it would materially change the evidence required to prove the facts attending its execution. And in *Laub vs. Payne*,

et al., 46 Iowa, 550, where a note had been changed by the addition of the word "surety" after his name, the court held that such alteration avoided it upon the same principle, saying that the surety became liable to be subjected to the necessity of showing by parol as between him and the principal what his true relation to the instrument was, whereas before the alteration it appeared upon its face.

In *Wallace vs. Jewell*, 21 Ohio St., 174, the court said: "It is not a question what the party making the alteration intended, or whether it is a forgery or not, but whether it destroys the identity of the instrument.

In *Woodward vs. Bank of North America*, 19 Johns., 393, where a note was made and endorsed in renewal of a note payable at the Bank of North America, after endorsement the maker seeing that no place of payment was named in the note, in the most perfect good faith made a memorandum in the margin, "payable at the Bank of North America," and in that condition delivered it to the bank. Held, that the endorser was discharged.

In *Sharp vs. Bagwell*, Dev. Eq., 115, the court held that cutting off the name of a subscribing witness to a note, although done without any bad motive, not only avoided the note, but that the party was without remedy either to recover the original consideration or in equity.

In *Davidson vs. Cooper*, 13 Mee & Wels, 352, seals had been added to the note, the court said: "Any Alteration which destroys the *identity* and changes the evidence in respect to the transaction to which it relates, will avoid it." *Hall's adm'r vs. McHenry*, 19 Iowa, 525.

In *Murray vs. Graham*, 29 Iowa, 250, the court said: "A material alteration by the holder, although made without fraudulent intent, will destroy the note." An alteration made by the payee would have that effect—*Id.*, And in *Dickerman vs. Miner*, 43 Iowa, 508, the court held that the addition of another name would discharge the original sureties *regardless of the fact of benefit or injury.* As to the claim made by counsel that alterations before delivery, will, in the hands of a third person, not have this effect, there are many cases which hold to the contrary. *Hamilton vs. Hooper*, 46 Iowa, 515, which was of an alteration after delivery to an agent, the point was raised that the note was not fully issued at the time of

the alteration. The court held that the alteration avoided the note. *Fay, vs. Smith*, 1 Allen, 477.

In *Draper vs. Wood*, 112 Mass., 315, an alteration was made by one of the makers before delivery, not only without the knowledge of the payee, but without any fraudulent intent, the court held that it destroyed the *identity* of the note, and that there could be no recovery either upon the note as it was *or by restoring it to the condition in which it was before the alteration.* To the same effect, *Robinson vs. Reed*, 46 Iowa, 519, besides this note has not been restored to its original condition. So in *Greenville Bank vs. Stowell*, 123 Mass., 196, an alteration before delivery, the court said its effect was to render the contract wholly void against one not consenting. So in *Waterman vs. Vose, et al.*, 43 Me., 510, the court held that the alteration of the note by the maker after it was endorsed, but before delivery, discharged the endorser.

In *Chapel vs. Spencer*, 23 Barbour, 585, it was held that the addition of another name honestly made, and simply for the purpose of adding the security of the person so signing avoided the note.

In *Lisle vs. Rogers*, 18 B. Monroe, 585, it was held that an alteration before delivery had the same effect as one made after delivery to the payee.

In *Stevens vs. Graham*, 7th S. & R., 505, the court say "the principle of the rule as to alterations innocently made, is that the alteration destroys the identity of the instrument." And we suppose the effect upon the mortgage was the same as if her name had been written in that too.

In *Aldridge vs. Smith, et al.*, 37 Mich., 498, where a promissory note was endoosed by the payee and another person, the maker in good faith inserted the name of the second indorser as payee, held that the alteration released both endorsers.

That a note or bill will be rendered void by an alteration made by one having its custody, *see Æna Ins. Co. vs. Winchester*, 43 *Conn.*, 391; *Belknap vs. National Bank*, 100 Mass., 376. The Cases are well digested in Bigelows Bills, and notes, p. 274–580 Ind., *an alteration by the the consent of the defendants will avoid the note. Brooks vs. Allen*, 62 *Ind.*, 401. If Krueger was not the real payee, he was for the *purpose of endorsing the note, plaintiff's agent. p.* 77.

It is claimed by appellant's counsel, that Krueger, although the nominal payee, was not the real party to the note, and if Mrs Werge's name was added by him such alteration of the note stands upon a different ground form that which it would if he were the real party in interest. Mrs. Werges understood him to be the real party, and that the mortgage was to be held by him, although in some way she had also got the idea that he was to raise money upon it. But the legal effect of the note cannot, as to either Mr. or Mrs. Werges, be changed by parol evidence. Daveis, 161; 1 McAllister, 20: 8 Johnson, 189; 9 Cowan, 747; 2 Wharton on Evidence, Sec. 1058;

While there are cases which hold that the alteration of a note when innocently made will not defeat a recovery in an action upon the original consideration, yet that cannot affect this case against either Mr. or Mrs. Werges, certainly not as to the latter, for as to her there was not only no consideration, but the alteration was fraudulently made. She was bound by her contract or not at all, and any alteration, although not to her prejudice, but which destroyed its identity upon the principles of the cases cited would release her.

Rule as to alteration applied to a mortgage, *Murey vs. Dunlap*, 5 Law. 365, bond and mortgage to be considered together. *Kennedy vs. Ross*, 25 Pa. St. 256. General rule on Con. sec. 665—Alterations generally. *Id* 695

The note in its altered form as evidence does not sustain the allegations of the bill, it is not the note there discribed, besides the difference between the note as it came into plaintiff's hands and the note described in the mortgage was notice to him of the alteration.

If counsel is right in his claim, one who has commited forgery in making the alteration is in a better position than one who has altered the paper under a mistaken but supposed right to do so.

The claim that an action could be maintained against Mrs. Werges upon the mortgage would not help him in this case, for it is beyond debate that the circuit court would not have had jurisdiction of a suit to foreclose the mortgage as the parties to it were all citizens of the State of Iowa. Besides Mr. Werges had nothing to mortgage. *Sheldon vs. Sill*, 8 How., 441.

GALUSHA PARSONS.
Of Counsel for Appellees.

112-139

Stipulation, Assignment of Errors and Prayer for Reversal.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. ~~242~~ 7

JOSEPH J. MERSMAN, Appellant,

vs.

CASPER A. WERGES and LUCY W. WERGES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

IN THE

Supreme Court of the United States.

JOSEPH J. MERSMAN,
Appellant,

vs.

CASPER A. WERGES AND LUCY W. WERGES, *Appellees.*

Whereas, the following deed from Casper A. Werges to Lucia W. Werges was read in the circuit court upon the hearing of this cause, but by some inadvertence was not made a part of the transcript by the clerk upon his return to this court;

It is hereby stipulated that the record now on file in this court be amended by adding thereto the said deed, in the words and figures following, to-wit:

Know all men by these presents, that I, Casper Adam Werges, of the county of Clayton and state of Iowa, in consideration of the sum of nine thousand eight hundred dollars, in hand paid by Lucia W. Werges, of Clayton county and state of Iowa, do hereby sell and convey unto the said Lucia W. Werges the following described premises, situated in the county of Clayton and state of Iowa, to-wit, viz.: the east half of the southwest quarter and the west half of the southeast quarter of section thirty; the southwest quarter of the northeast quarter of section thirty; and the northwest quarter of the northwest quarter of section twenty-seven; all in township ninety-four, north of range three, west of the fifth principal meridian, containing two hundred and forty acres, more or less, together with the northeast quarter of the southeast quarter of section two, township ninety-three, north of range three, west of the fifth principal meridian, except so much as is sold to John Lossing and A. C. Fisk. And I hereby covenant with the said Lucia W. Werges that I hold said premises by good and perfect title, that I have good right and lawful authority to sell

and convey the same, that they are free and clear from all liens and incumbrances whatsoever. And I covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. And the said —— —— hereby relinquishes her right of dower in and to the above described premises.

Signed this first day of June, 1869.

CASPER ADAM WERGES.

In presence of

SAMUEL MURDOCK.
J. B. GUINZIUS.

U. S. Revenue Stamp, $10.00.
CASPER ADAM WERGES.
June 1, A. D. 1869.

STATE OF IOWA, } ss.
CLAYTON COUNTY. }

On this first day of June, A. D. 1869, before me, Diederick Schroeder, a justice of the peace, within and for said county, personally came Casper Adam Werges, personally to me known to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the same to be his voluntary act and deed, for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name at Garnavillo, on the day last above written.

DIEDERICK SCHROEDER,
a Justice of the Peace.

Filed June 4, 1869.
W. D. CROOKE, *Recorder.*

With the same force and effect as if a motion had been made in this court, as provided by the fourteenth rule, and allowed. And it is further stipulated that the said record be further amended by adding thereto, with like force and effect as if the same had been originally made a part thereof, the following

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

Comes now the said appellant, Joseph J. Mersman, and says that in the record and proceedings aforesaid there is manifest error in this:

The said court erred in holding and deciding—

1. That the alleged alteration of the note was made by E. H. Kruger.

2. That the defendant, Lucy W. Werges, was a surety in the contract, evidenced by the note and mortgage.

3. That the alleged unauthorized addition of the name of Lucy W. Werges to the note was a material alteration of the contract, evidenced by the note and mortgage.

4. That by the addition of the name of Lucy W. Werges to the note she became a principal instead of an accommodation party to the contract.

5. That the alleged alteration was material as against complainant, having been made before the note had come into the possession of any holder for value.

6. That the relation of E. H. Kruger was such in the transaction, to complainants, as that the alteration, if made by him, would affect their rights.

7. That in order to maintain the suit upon the mortgage alone, it would be necessary to treat the defendant, Lucy W. Werges, as a joint debtor with her husband, Casper A. Werges.

8. That even though the mortgage were not affected by the alteration, the bill must, at that stage of the cause and in the condition of the pleadings, be dismissed for want of jurisdiction, on account of the citizenship of the parties.

9. In dismissing complainants' bill and refusing to grant the relief prayed by complainants therein.

Wherefore the said appellant prays that the judgment and decree aforesaid be reversed and altogether held for naught.

C. H. GATCH,
Solicitor for Appellant.

GALUSHA PARSONS,
Solicitor for Appellees.

P. C. Kenyon, Publisher Law Briefs, Des Moines.